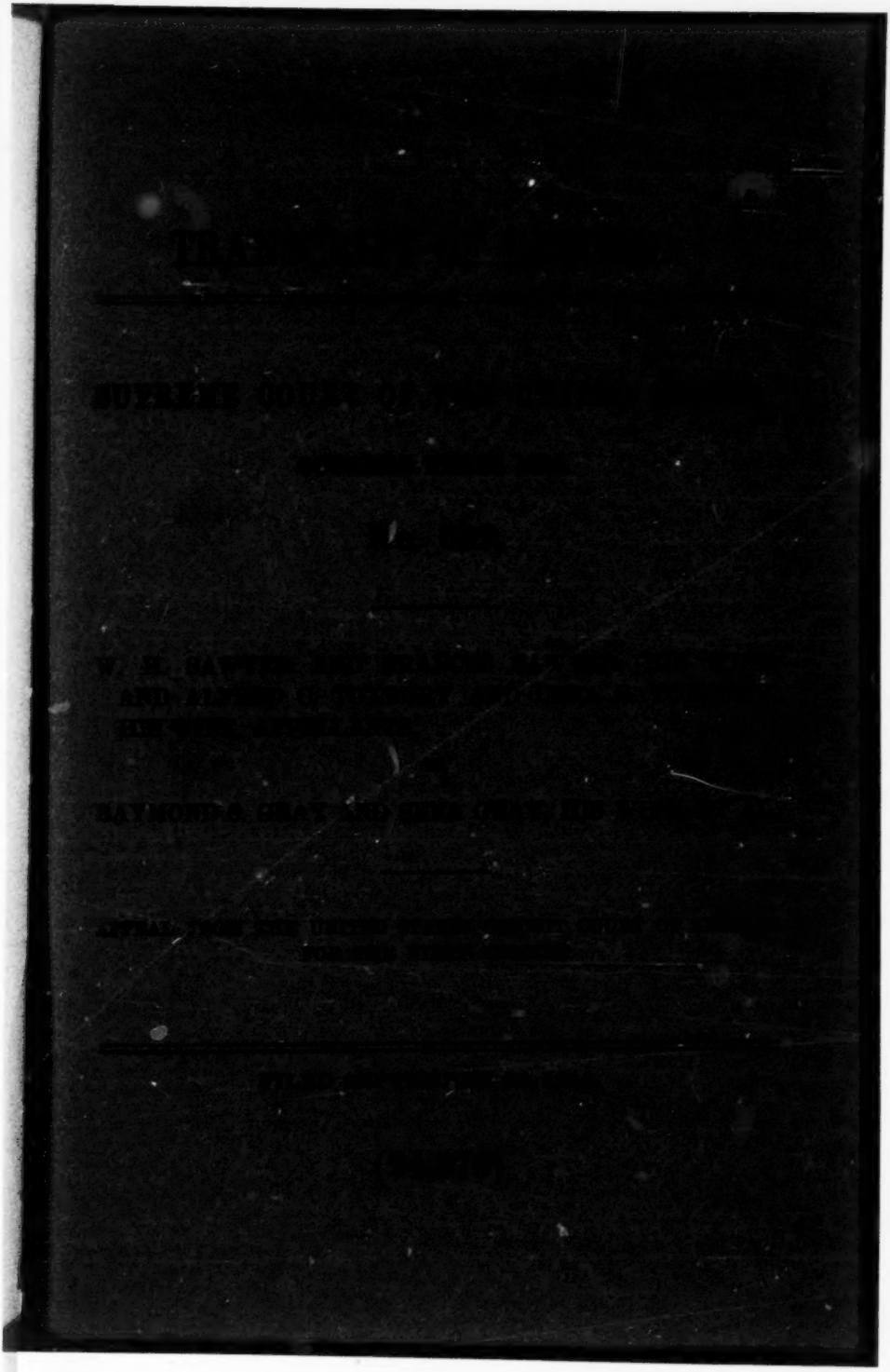


(24,376)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 632.

W. H. SAWYER AND FRANCES SAWYER, HIS WIFE, AND ALFRED C. TUXBURY AND LENA B. TUXBURY, HIS WIFE, APPELLANTS,

vs.

RAYMOND S. GRAY AND SENA GRAY, HIS WIFE, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1914.

a United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and Lois A. Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed Apr. 24, 1914.

1 *Names and Addresses of Solicitors.*

Herbert S. Griggs, Esquire, Fidelity Building, Tacoma, Washington, Solicitor for Appellants.

F. M. Dudley, Esquire, White Building, Seattle, Washington, Solicitor for Milwaukee Land Company.

Peters & Powell, Esquires, New York Block, Seattle, Washington, Solicitors for W. W. Barr et ux.

W. A. Reynolds, Esquire, Chehalis, Washington, Solicitor for Raymond Gray et ux., and W. A. Gray et ux.

Moulton & Schwartz, Esquires, Portland, Oregon, Solicitors for Chas. S. Forbes et ux., and Frank L. Huston, John H. Patten et ux.

In the United States District Court for the Western District of Washington, Western Division.

No. 1696.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Complainants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and —— Gray, His Wife; Charles S. Forbes and Adelaide F.
2 Forbes, His Wife; Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife; W. W. Barr and —— Barr, His Wife, and Milwaukee Land Company, a Corporation, Defendants.

Stipulation [for Substitution of Executors and Heirs of Alfred C. Tuxbury in Lieu of Alfred C. Tuxbury, Deceased, and Concerning Preparation of Record on Appeal].

1. It is stipulated between the parties hereto, by their respective counsel, that in view of the death, since the commencement of this action, of Alfred C. Tuxbury, one of the complainants herein, Luna B. Tuxbury and Charles Hill, as executors of the estate of said Alfred C. Tuxbury, deceased, appointed as such by the Orphans' Court of Essex County, State of New Jersey, and Edith E. Tuxbury Hill, Alice Bosworth Tuxbury and Luna Elizabeth Tuxbury be substituted, as the executors of said estate and the heirs of said estate, together with Luna B. Tuxbury, in lieu of and instead of said Alfred C. Tuxbury, deceased, without requiring the probate of the will of said deceased, and the taking out of any ancillary letters of administration in said estate in any court in the State of Washington.

2. It is stipulated between the parties hereto, by their respective counsel, that service of notice of appeal, bonds on appeal, and all other papers in connection with the appeal, or proposed appeal, to be made by the complainants to the United States Circuit
3 Court of Appeals from the judgment herein dismissing this cause, etc., together with service of transcript and brief on appeal and all other papers, may be made and all be sufficient as to all of the defendants in error if made upon F. M. Dudley, Esq., as attorney for the defendant Milwaukee Land Company.

3. It is further stipulated and agreed between the parties hereto that the transcript of record on appeal shall include only the following papers, to wit:

1. Summons and third amended bill of complaint.

2. Demurrer to second amended bill of complaint of Milwaukee Land Company and the stipulation providing that said demurrer shall stand as to each and every of the defendants to the third amended bill of complaint.

3. Order sustaining said demurrer.

4. Election of complainants to stand on third amended bill.
5. Judgment of dismissal in favor of defendants.
6. Bill of Exceptions and Order settling the same.
7. Petition for writ of error.
8. Order allowing writ of error.
9. Assignment of errors.
10. Bond on appeal.
11. Writ of error.
12. Citation in error.
13. Præcipe and stipulation for transcript.
14. Stipulation for substitution of executors and heirs of Alfred C. Tuxbury in lieu of said Alfred C. Tuxbury, and order allowing substitution.

4 4. It is further stipulated that the Clerk in printing the record on appeal may omit from the various papers as above agreed on, the hearing and title of the cause other than a description of the particular paper, and also omit all endorsements on said paper, filing marks, service returns, verifications and receipts, save and except that the heading and title of this stipulation shall be entered in full.

HERBERT S. GRIGGS,
Attorney for Complainants.
F. M. DUDLEY,
Attorney for Milwaukee Land Company.
PETERS & POWELL,
Attorneys for W. W. Barr and Gertrude G. Barr, His Wife.
W. A. REYNOLDS,
Attorney for Raymond S. Gray and Sena Gray, His Wife; W. A. Gray and Lois Gray, His Wife.
MOULTON & SCHWARTZ,
Attorney- for Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife.

(Filed Jan. 7, 1914.)

Stipulation [for Correction of Stipulation for Substitution and for Preparation of Record on Appeal].

It is hereby stipulated and agreed between the parties hereto by their respective counsel that Paragraph III of the former stipulation entered into between said parties with respect to substitution
5 of certain parties complainant and the service of notice of appeal and other papers on appeal upon F. M. Dudley, Esq., be corrected to read as follows:

III.

It is further stipulated and agreed by the parties hereto that the transcript on record on appeal shall include only the following papers, to wit:

1. Summons and Third Amended Bill of Complaint.
2. Demurrer to Second Amended Bill of Complaint of Milwaukee Land Company and the Stipulation providing that said demurrer shall stand as the demurrer of each and every of the defendants to the Third Amended Bill of Complaint.
3. Order sustaining said demurrer.
4. Election of complainants to stand on Third Amended Bill of Complaint.
5. Judgment of dismissal in favor of defendants.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignments of Errors.
9. Bond on Appeal.
10. Citation on Appeal.
11. Præcipe for transcript.
12. The original Stipulation of which this stipulation is amendatory.
13. Order Allowing Substitution of Executors and Heirs of Alfred Tuxbury, Deceased.
14. This stipulation.

Second. It is further stipulated that the other provisions of
6 the original stipulation, to wit: Paragraphs I, II and IV, remain in full force.

HERBERT S. GRIGGS,
Attorney for Complainants.
PETERS & POWELL,
Attorney- for W. W. Barr and Wife.
W. A. REYNOLDS,
Attorney for Raymond S. Gray and Wife and W. A. Gray and Wife.
MOULTON & SCHWARTZ,
H. D. H.,
Attorney- for Frank L. Huston.
MOULTON & SCHWARTZ,
Attorney- for John H. Patten and Wife.
F. M. DUDLEY,
Attorney — Milwaukee Land Co.

(Filed Feb. 3, 1914.)

Third Amended Bill of Complaint.

Complainants for cause of action against the said defendants, and each of them, allege and show to the Court as follows:

I.

That the complainants, W. H. Sawyer and Frances Sawyer, are now, and at all times in this third amended complaint mentioned *are*, husband and wife, and citizens of the United States and residents of the State of Massachusetts; that the complainants, Alfred C. Tuxbury and Luna B. Tuxbury, are now, and at all times in this

third amended complaint mentioned were, husband and wife and citizens of the United States and residents of the State of New York.

7

II.

That the defendants, Raymond S. Gray and Sena Gray, are now, and at all times in this third amended complaint mentioned were, husband and wife and citizens of the United States and residents of the State of Washington; that the defendants, W. A. Gray and Lois Gray, are now, and at all times in this third amended complaint mentioned were, husband and wife and citizens of the United States and residents of the State of Washington; that the defendants, Charles S. Forbes and Adelaide F. Forbes, are now, and at all times in this third amended complaint mentioned were, husband and wife and citizens of the United States and residents of the State of Washington; that the defendant, Frank L. Huston, is, and at all times in this third amended complaint mentioned was, a citizen of the United States and a resident of the State of Oregon; that the defendants, John H. Patten and Dora W. Patten, are now, and at all times in this third amended complaint mentioned were, husband and wife and citizens of the United States and residents of the State of Colorado; that the defendants, W. W. Barr and Gertrude G. Barr, are now, and at all times in this third amended complaint mentioned were, residents of the State of Washington and citizens of the United States; and that defendant, Milwaukee Land Company is, and at all times in this third amended complaint mentioned was, a corporation organized and existing under the laws of the State of Washington and doing business in the State of Washington.

8

III.

That on January 25, 1899, the State of Washington made request to the Commissioner of Public Lands for a survey of all public lands in township 11 north, range 4 east, Willamette meridian (including also the public lands in certain other townships not included in this action), all under and pursuant to the provisions of the act of August 18, 1894; that at the time of the making of said request, the west half (W. ½) of section thirty-two (32) of said township 11 north, range 4 east, was a part of the unappropriated unsurveyed public lands of the United States, and as such was duly surveyed and shown upon the plat and survey so requested, and which plat and survey was thereafter duly filed in the United States Land Office at Vancouver, Washington, on April 10, 1901; that thereby and pursuant to the provisions of said Act of August 18, 1894, said State of Washington was allowed a period of sixty days after the filing of said survey and plat, to wit, until June 9, 1901, within which to select from the said unappropriated lands in said township such portions thereof as it desired and within which to file in the said United States Land Office a list of its said selections; that on June 6, 1901, the said State of Washington filed in the United States Land Office a list of *of* selections made by it under the provisions of said Act of August 18, 1894; that the said west half (W. ½) of said sec-

tion 32, township 11 north, range 4 east, was not included in the list so filed by the State of Washington, and was not, nor was any
9 part thereof, selected and appropriated by the State of Washington within the said limited period of sixty days, or at all.

IV.

That prior to March 29, 1900, F. A. Hyde & Company, a corporation organized and existing under the laws of the State of California, and their grantors had obtained United States Patents to and become the owner of certain land within the limits of the State of California, described as follows: All of section 16, and the west half (W. ½) and the southeast quarter (S. E. ¼) of section 36, township 9 north, range 28 west of San Bernardino meridian. That thereafter and prior to said March 29, 1900, the said lands owned by F. A. Hyde & Company, amounting in all to 1,120 acres of land, were included within the limits of a public forest reservation established by the President and Congress of the United States and known as Pine Mountain and Zaca Lake Forest Reserve, and the said F. A. Hyde & Company, the owners thereof, under and pursuant to the provisions of the Act of Congres of June 4th, 1897, and other acts of Congress applicable and under and pursuant to the customs, rules and regulations in force and observed by the General Land Office and officials of the Land Department of the United States did relinquish the said tract or tracts amounting to 1,120 acres so included in the Pine Mountain and Zaca Lake Forest Reserve; and did duly convey the said lands so relinquished to the Government by deed duly filed for record and recorded in the Public Records of the State of California, and did duly furnish the United States officials with
10 an abstract of title duly authenticated, showing chain of title of land so relinquished from the Government back again to the United States, and that in lieu of the lands so relinquished and on or about March 29th, 1900, said F. A. Hyde & Company did make application for an entry upon the west half (W. ½) of section 33, township 11 north, range 4 east of the Willamette meridian (together with certain other lands, the total amount of lands so selected amounting to 1,120 acres in all), all situate in the county of Lewis, State of Washington; that the lands so relinquished, situate in the State of California, had all been patented by the United States and the said F. A. Hyde & Company were the owners thereof under such patents; that the said lands so selected, to wit, the west half (W. ½) of section 32, township 11 north, range 4 east, W. M., *was* on said March 29, 1900, vacant, nonmineral, public lands, subject to homestead entry, and did not exceed in area the tract covered by the lands so relinquished and surrendered; that the said application was duly made and received and filed in the office of the United States Land Office at Vancouver, Washington, and the said F. A. Hyde & Company furnished said officials of said Land Office with an abstract of title duly authenticated, showing the title of the land so relinquished from the Government back to the United States, and also furnished due proof that said lands so selected in lieu thereof were vacant, unoccupied, nonmineral public lands open to entry and

settlement and in all other respects complied with the laws,
11 rules and regulations of the Government applicable, and the said application was filed and proof was made and received in the said United States Land Office at Vancouver, Washington, and in accordance with the customs, rules, and regulations in force and generally observed in said Department by the officials thereof, and by persons having business therein, and the said F. A. Hyde & Company, and their successors in interest, thereupon became the equitable owners and entitled to a patent to the said lands, but the Department of the Interior wrongfully and by mistake of law, and on or about December 21st, 1901, decided that said original application was invalid on the ground, and for the reason that at the time it was filed the sixty-day limit allowed the State of Washington to make selections of the public lands in said township 11 north, range 4 east, had not expired, and in that particular the complainants further allege that on March 29, 1900, to wit, at the time said F. A. Hyde & Company made said application and entry, and also on March 2, 1902, when the second application was made, as in paragraph five hereof stated, there was in force and generally observed in the Land Department of the United States, particularly in the United States Land Office at Vancouver, Washington, a custom, rule and regulation whereby applications such as those so made by F. A. Hyde & Company, were received and filed, and held, notwithstanding the fact that there was also on file at the same time a prior application or a request similar to that made by the State of Washington,
'as heretofore in paragraph three hereof alleged; and that pur-
12 suant to said claim, rule and regulation, the said subsequent applications of F. A. Hyde & Company were received subject to any such prior applications and particularly to whatever selections the said State of Washington might make, as by law provided, within sixty days after the survey of said lands was made and filed, and subject to the final disposition of such prior applications, and in this instance that under the said customs, rules and regulations the said application so subsequently received and filed was understood to and did in fact become the exclusive application and appropriation of all lands included within its descriptions which were not so definitely elected by the State of Washington within the sixty-day limit, and complainants allege as aforesaid that within the sixty-day limit the said State of Washington did file its list of selections, and that the list of selections so made by it did not include the said west half (W. ½) of section 32, and complainants allege that thereupon and pursuant to the customs, rules and regulations in force and observed in said Land Office, and under and pursuant to the said Acts of Congress, the said application so made by F. A. Hyde & Company on March 29, 1900, and so received and filed by the officer of the said United States Land Office, did become the exclusive appropriation of said lands for the benefit of F. A. Hyde & Company and their successors, and that such appropriation took effect by relation to and as of the date of March 29th, 1900.

V.

That on March 3, 1902, after the sixty days allowed the
13 State within which to file its list of selections subsequent to the filing of the plat and survey of said lands as aforesaid had elapsed, and after all rights of the State of Washington in and to said west half of said section 32, or any part thereof, had lapsed as aforesaid, said F. A. Hyde & Company, pursuant to the terms of said Act of June 4, 1897, and pursuant to the customs, rules and regulations in force in and observed by the General Land Office and officials of the Land Department of the United States, made a second selection and application for an entry upon the said west half (W. ½) of said section 32, township 11 north, range 4 east, of the Willamette Meridian, in lieu of certain other base land formerly owned by said F. A. Hyde & Co., and theretofore surrendered to and accepted by the United States Government in accordance with the provisions of said Act of June 4, 1897, and made due proof of all facts required to be proven under the terms of said Act to entitle said F. A. Hyde & Co. to the land so selected. Said selection was made in writing as required by law, and the said paper, together with certificates, affidavits, and other papers therein referred to, and as required by the rules and practice of the United States Land Department, were duly filed with the United States Land Office at Vancouver, Washington, on said March 3, 1902; that at the time of filing said second application and selection of said land, the said land was a part of the surveyed public lands of the United States, unappropriated and subject to entry and selection as aforesaid, and by virtue of the said second application thereof and entry thereon as aforesaid, by
14 the said F. A. Hyde & Co., and the complainants, the said F. A. — & Co., their successors and assigns, thereupon became the equitable owners of said land, and became entitled to patent therefor; that prior to the time of making said second selection, the said F. A. Hyde & Co. were the owners under patent from the United States of the northeast quarter (N. E. ¼) and the southeast quarter (S. E. ¼) of section 16, township 9 north, range 28 west of San Bernardino Meridian, and containing 320 acres situate in the State of California, and that the lands so owned had subsequent to the patenting of the same by the United States been included within the boundaries of the Pine Mountain and Zaca Lake Forest Reserve, and that the said F. A. Hyde & Co., as the owners thereof, had duly relinquished and reconveyed the said lands to the United States, and that the said second application made by the said F. A. Hyde & Co., for the said west half (W. ½) of said section 32, township 11 north, range 4 east, was so made by them in lieu of said 320 acres of land so relinquished, and that the said second application was accompanied by an abstract of title duly authenticated and certified, showing chain of title to the land so relinquished from the Government back again to the United States, together with due proof from the public officers showing that the said land so relinquished was free from incumbrances of any kind, and that all taxes thereon to the date of said second application had been paid, together with affidavits showing the said lands so selected in lieu

thereof were nonmineral and nonsaline in character and un-
15 occupied, and that the said F. A. Hyde & Co. in all other respects conformed to the acts of Congress and laws of the Land Department of the United States; that the said second application, with all papers accompanying the same, were duly received and filed by the officers of said Land Department at Vancouver, Washington, and duly forwarded to the Commissioner of the General Land Office at Washington, D. C., for consideration and approval, all in accordance with the acts of Congress applicable thereto.

That prior to March 29, 1900, and for the purpose among other things of facilitating the exercise by those entitled thereto of the rights provided under the said act of June 4, 1897, for the owners of lands included in forest reserves, and for the purpose of facilitating the transfer of such rights and giving the same some practical value in accordance with the intent and purpose of said act of June 4, 1887, the Department of the Interior had promulgated the rule of allowing and permitting the owner or owners of such lands to file applications as aforesaid for timber lands in lieu thereof by and through an attorney or attorneys in fact appointed for that purpose by the said owners by written power of attorney, and that prior to said March 29, 1900, the practice and custom had grown up and become established and was universally observed in the United States Land Offices with the knowledge, consent and approval of the Secretary of the Interior and all of the officials of the Land Department of the United States wherein and whereby the said rights to
16 select lieu lands were regularly and usually and commonly sold in the open market and the said rights exercised under powers of attorney by persons other than the original owners of the lands that had been included in United States forest reserves.

That pursuant to said practice and customs the abstract of title and written power of attorney and other papers evidencing the right shown by the original owner of the land included in any particular forest reserve, became known as lieu land scrip and was bought and sold in the open market for value, and the rights thereunder were exercised by the final purchasers thereof to the extent of many thousands of acres all with the knowledge, consent and approval of the various registers and receivers of the various land offices of the United States and the Secretary of the Interior and other officials of the Department of the Interior of the United States.

That this practice and custom was so observed and followed and consented to and approved of by the officials of the United States Land Office and Department of the Interior as aforesaid in a thousand or more instances between the date of the passage of said act of June 4, 1887, and said March 29, 1900, and thereafter continuously until after March 3, 1902.

That your complainants had knowledge of the said practice and custom and of the knowledge, consent to and approval thereof by the said officials of the United States Land Offices and of the Department of the Interior and in reliance thereon and in good faith pur-

chased of the said F. A. Hyde & Company their said rights
17 under the surrender and conveyance by said F. A. Hyde & Company to the United States of the 1,120 acres of land referred to in paragraph 4 hereof and on the said 320 acres of land referred to and described in paragraph 5 hereof, and that your complainants have succeeded to all of the rights, titles and interests of the said F. A. Hyde & Co. under said relinquishments and conveyances and the said applications made in the name of F. A. Hyde & Co as aforesaid, and are entitled to have patents to the said lieu lands so selected and applied for issued and confirmed in their said grantors, said F. A. Hyde & Co., or to the complainants as their said successors and assignees.

That the said second application, as also the said original application for said lands, made in the name of F. A. Hyde & Co., was in truth and in fact made for and on behalf of complainants herein as the purchasers and owners of the rights of the said F. A. Hyde & Co. to make selection of public and unappropriated lands for and in lieu of the base land theretofore surrendered by said F. A. Hyde & Co. to the United States as aforesaid, and on December 24, 1900, complainants duly filed and caused to be recorded in the office of the Auditor of Lewis County, Washington, in Volume 1 of Powers of Attorney, at page 341 (the lands hereinbefore being situate in said Lewis County, Washington), the original power of attorney executed by the said F. A. Hyde & Co. to one Charles Hill, authorizing said attorney to select lieu lands in lieu of the base lands theretofore owned and surrendered in the United States Government by
18 said F. A. Hyde & Co., as aforesaid, and with full power to sell and dispose of the lands so selected, and also on December 24, 1900, caused to be filed and recorded in the office of the Auditor of said Lewis County, Washington, in volume 59 of Deeds, at page 418, a deed conveying to complainants all rights, titles, and interests in and to said west half (W. ½), of section 32, township 11 north, range 4 east, and complainants allege that in fact and in truth the said Charles Hill, so appointed attorney in fact for the said F. A. Hyde & Co., was the agent and trustee of and for your complainants of all rights and interests which the said F. A. Hyde & Co. had to select lands in lieu of the base lands surrendered as a part of the said original application made in the name of F. A. Hyde & Co., on March 29, 1900, and to select lands in lieu of the lands owned by the said F. A. Hyde & Co., and surrendered as a part of selections made under the second application made in the name of F. A. Hyde & Co. on March 3, 1902. That the instruments and papers so filed in the United States Land Office at Vancouver, Washington, and in the office of the Auditor of Lewis County, Washington, were notice of the contents thereof to the world under and in accordance with the provisions of the Statutes of the State of Washington, and particularly under and in accordance with the provisions of Section 8781, Remington & Ballinger's Annotated Codes and Statutes of the State of Washington, and acts amendatory thereof.

That the rights so acquired by your complainants under the relin-

quishments and conveyances to the United States of said
19 1,440 acres of land and under the selections made in lieu
thereof as aforesaid were expressly recognized, protected and confirmed by the provisions of the Act of Congress of June 6, 1900, entitled Sundry Civil Appropriation Act 31 Stat. L., page 614, and also by the provisions of the Act of Congress of March 3, 1901, 31 Stat. L., page 1037 and by the provisions of the Act of Congress of March 3, 1905, 33 Stat. L., p. 1264, and the rejection of your complainants' first or original application and selection as aforesaid and the issuing of patents to other parties as hereinafter stated, to the lands so selected, and in disregard of your complainants' said rights under said relinquishments and conveyances of the base land and said original and supplementary selections of the said lieu land was and each of said acts was in violation of the provisions of said acts and was and is unauthorized and void.

VI.

That shortly after the filing of said second application and entry upon said land, to wit, on or about the 21st day of November, 1902, the Land Department of the United States promulgated a rule and order suspending all further proceedings upon entries made with any of the so-called Hyde scrip, which order had never been revoked and is still in force, and which order affected said second application. That no action has been taken by the United States Land Department since that date on said second application and selection of your complainants and their assignors as aforesaid; that your petitioners
have at all times and in all things exercised due diligence in
20 attempting to secure a hearing before the Land Department of the United States upon their said second application and entry upon said lands made on March 3, 1902, as aforesaid; that no hearing has ever been had thereon, and no action has ever been taken thereon, and the same remains and is still pending before the Land Department of the United States as aforesaid.

VII.

That on or about May 1st, 1908, a United States patent for a portion of the said lands, to wit, the west one-half (W. ½) of the southeast quarter (S. E. ¼) and the southeast quarter (S. E. ¼) of the southwest quarter (S. W. ¼) of section thirty-two (32), township eleven (11) north, range four (4) east, of the Willamette Meridian, was issued by the United States Government to the defendant Raymond S. Gray, said Raymond S. Gray having theretofore made a certain pretended entry and application for the purchase of said land; that on or about November 8, 1905, a United States Patent covering certain other portions of said lands, to wit, the west half (W. ½) of the northwest quarter (N. W. ¼) and the southeast quarter (S. E. ¼) of the northwest quarter (N. W. ¼) and the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) of said section thirty-two (32), was issued by the United States to the defendant Charles S. Forbes, having theretofore made a certain pretended entry on and application for the purchase of said land; that

on or about the 30th day of December, 1907, a United States patent covering the other portion of said lands, to wit, the northeast
21 quarter (N. E. ¼) of the northwest quarter (N. W. ¼) of said section thirty-two (32), was issued by the United States to John H. Patten, said John H. Patten having theretofore made a certain pretended entry on and application for the purchase of said land. That the United States patent to Raymond S. Gray was recorded in volme 1 of patents, at page 637, and was filed for record in the office of the Auditor of Lewis County, Washington, on September 29, 1906, and designated as fee number 36,222. That said United States patent to Charles S. Forbes was recorded in volume 5 of patents, at page 474, and was recorded in the office of the Auditor of said Lewis County, Washington, on or about June 15, 1907, and designated as fee number 40,758. That said United States patent to John H. Patten was recorded in Volume 7 of United States Patents, at page 362, and on February 5, 1908, was recorded in the office of the Auditor of said Lewis County and designated as fee number 43,738. That thereafter and prior to the commencement of this suit various transfers of the said property have been made or attempted to be made by the said patentees to one or more of the other defendants herein, and that under and by virtue of the said patents and the said divers mesne conveyances and under the covenants of warranty contained in the various deeds made or attempted to be made by the said defendants of the said lands, or some portion thereof, the said defendants claim to have some right, title or interest in and to the said lands or some portion thereof, the exact nature and particulars of which said claims and interests, if any, your
22 complainants have no knowledge of, other than as herein stated; but complainants allege that in fact and in truth each and every of the said patents in this paragraph hereinbefore described was and were issued as aforesaid in contravention of the rights, claims and interests in and to said lands of or belonging to your complainants and their said grantors, F. A. Hyde & Co., and without any knowledge thereof on the part of these complainants or their said grantors, and that each and every of the said divers deeds made or attempted to be made of said lands, or some portion thereof, by and between these defendants as aforesaid, were made in contravention of the claims, rights and interests in said lands of these complainants, and their said grantors, and without any knowledge thereof on the part of these complainants or their said grantors, F. A. Hyde & Co., and said patents and deeds were and are void and should be canceled. And complainants further allege that each and every of said defendants, at the time of making their said pretended applications for and entry upon and purchase of said lands from the United States Government and at the time of the issuance of the United States patent therefor as aforesaid, and at all times since prior to the commencement of this action, by the exercise of due diligence could have acquired and should have acquired full knowledge, of the rights, claims and interest of these complainants, and their said grantors, in and to the said premises, and as complainants are informed and verily believe did have actual notice and

knowledge thereof, and that whatever claim, right, title or in-
23 terest these defendants or any of them had in and to the said premises was acquired with full knowledge of the said prior right of these complainants and their said grantors, F. A. Hyde & Co., in and to the said lands or any part thereof, have been so or otherwise acquired by said defendant-, or any of them, are wholly subsequent, inferior and subject to the said right, and title of the complainants thereto. That the complainants had no knowledge of the making of said attempted entries upon said land by and on behalf of certain of said defendants, or of the said pretended patents and deeds, or of any of them, until shortly prior to the commencement of this suit. That complainants were relying in good faith upon the validity of their said applications for said lands as a fully and complete appropriation of the said lands to themselves exclusively, and upon the fact that their said application and entry made March 3, 1902, was still pending before the Land Department of the United States for approval thereof and for issuance of patent thereon, and that as soon as complainants were fully advised *and* that by mistake and error on the part of the defendants and the officials of the Land Department, other persons were making or had been making entries on and attempts to secure said lands, and that these complainants were being or might be defrauded of their rights and interests in said lands, your complainants at once commenced this action. That each and every of said pretended entries so made by said defendants on said land was permitted by the officials of the Land Department of the United States, and the said patents
24 to said land were issued as aforesaid by and on mistake of facts as well as law, and for the reason that said United States officials overlooked the fact that said second application made in the name of F. A. Hyde & Co. was still pending before the Land Department and was undisposed of, and that said lands under and by virtue of said second application had already been exclusively appropriated to and by said mistake, the exact nature of which is unknown to complainants, the pendency of said second application, and complainants' rights thereunder, were overlooked and forgotten and said patents erroneously and illegally issued as aforesaid.

VIII.

That on or about November 2, 1890, the Northern Pacific Railway Company attempted to file in the United States Land Office at Vancouver, Washington, a list of selections under the provisions of the Acts of Congress of March 2, 1899, which list included the west half (W. ½) of section 32, township 11 north, range 4 east, but the said selection was never accepted or received by the officials of the said Land Office, but was expressly rejected, and that any and all rights which the said Northern Pacific Railway Company might have had in the said lands under a selection properly made and received and filed in said Land Office were long prior to the inception of any title or interest in said lands by or on behalf of any of defendants wholly waived and abandoned, and other lands selected by patent to said Northern Pacific Railway Company, in lieu thereof.

25

IX.

That the issuance and record of the said United States Patents to said lands as aforesaid, and the making and entry of the said pretended deeds of said lands, or some part thereof which have passed between the defendants, as aforesaid, constitute, and each and every of the said instruments and the record thereof constitute, a cloud upon the title of these complainants to the said lands.

X.

That the premises considered, the defendants and each and every of them so far as they have any apparent record or legal title to the said lands under and by virtue of the said United States Patents issued therefor as aforesaid and the divers mesne conveyances issued as between the said defendants, are in fact and in truth holders of the legal title of said lands in trust for these complainants.

XI.

That said lands are vacant and unoccupied lands.

XII.

That the complainants have no speedy, adequate or sufficient remedy at law, and that it is necessary for complainants to invoke the equitable powers of the courts as herein prayed for.

Wherefore, complainants pray:

(1) That a monition or other process in accordance with the custom and practice of the Court may be issued and served upon the defendant- requiring each of them to appear in court and make full and true answer upon oath of the matters set forth in this
26 third amended bill of complaint, and particularly to set forth whatever right, title or interest they or any of them have or claim to have in and to the said property or any part thereof in the complaint described;

(2) For the decree of this Court establishing and declaring these complainants to be the sole and exclusive owners of the said lands in the complaint described, and of each and every part thereof, free and clear of any right, title or interest therein or thereto, of or belonging to the said defendants or any of them, or any person claiming by, through or under them, or any of them, and establishing and declaring that each and every of the said defendants so far as they or any of them have an apparent or legal title to any portion of the said lands under and by virtue of the United States patents heretofore issued therefor as in the complaint alleged and in this third amended complaint alleged and conveyances from the patentees therein named are in fact and in truth holders thereof in trust for the sole and exclusive use of these complainants, and ordering and directing the said defendants to execute and deliver to these complainants and their legal representatives a good and sufficient deed or deeds of the premises in this third amended complaint described, and for the further order of this Court appointing a special

Commissioner to carry out the said order and decree of the Court and to execute and deliver to the complainants such deed or deeds of the premises, in the event that any of the said defendants fail to do so within such reasonable time as the Court shall fix for exe-
27 cuting and delivering to the complainants such deed or deeds, or that said patents and deeds be ordered cancelled;

(3) Or in the alternative declaring the said several deeds conveying the said premises, or any part thereof, to the said defendants, or any of them, and all other deeds of conveyance of said lands, or any part thereof, to the said defendants, or any of them, and all other deeds of conveyance of the said lands, or any part thereof, made by and between the said defendant or any of them, to be wholly void, and ordering same to be cancelled and set aside of record.

(4) That these complainants have such other and further or different relief as to the Court may seem best.

HERBERT S. GRIGGS,
Attorney for Complainants.

Office: 1115 Fidelity Bldg., Tacoma, Wash.

STATE OF WASHINGTON,
County of Pierce, ss:

Herbert S. Griggs, being first duly sworn, on oath deposes and says: That he is the attorney for the complainants in the above-entitled cause; that he makes this verification for the reason that all of the complainants are nonresidents of the State of Washington, and are not now within the said State of Washington; that he has read the foregoing Third Amended Bill of Complaint, knows the contents thereof, and that the same are true, as he verily believes.

HERBERT S. GRIGGS.

28 Subscribed and sworn to before me this 28 day of October, 1913.

[SEAL.] C. E. STEVENS,
Notary Public in and for the State of Washington, Residing at Tacoma.

"Filed in the U. S. District Court, Western Dist. of Washington. Southern Division. Nov. 10, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy."

Demurrer to Second Amended Bill.

The said defendant, the Milwaukee Land Company, not confessing all or any of the matters and things in the second amended bill of complaint herein to be true, as therein alleged, doth demur to said second amended bill for the following reasons:

I.

That it appears upon the face of said second amended bill that the said complainants are guilty of laches.

II.

That the said second amended bill is without equity and does not set forth any matters entitled said complainants to any relief in this court.

Wherefore, this defendant prays the judgment of this Court whether it shall be compelled to further answer make unto said second amended bill.

F. M. DUDLEY,
GEO. W. KORTE,
Solicitors for Defendant Milwaukee Land Company.

29 I, F. M. Dudley, of counsel for the defendant, Milwaukee Land Company, in the above-entitled cause, do hereby certify that the foregoing demurrer to the second amended bill of complaint is in my opinion well founded in law.

F. M. DUDLEY.

(Verification.)

(Filed Jul- 25, 1912.)

Stipulation [That Demurrers to Second Amended Bill of Complaint Shall Stand as Demurrers to Third Amended Bill of Complaint, etc.].

It is hereby stipulated by and between the complainants and the several defendants, by their respective counsel herein, that the demurrers heretofore filed herein by and on behalf of the defendants, murrers filed by the defendants to the second amended bill shall stand as the demurrers of the said defendants, and each of them, to complainants' third amended bill of complaint, and that a hearing may be had upon the said demurrers on Monday, the 3d day of November, 1913, at Tacoma, Washington, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

HERBERT S. GRIGGS,
Attorney for Complainants.
F. M. DUDLEY,
PETERS & POWELL,
Attorneys for Defendants Barr and Wife.
W. A. REYNOLDS,
Attorney for Defendants Gray.
MOULTON & SCHWARTZ,
Attorneys for Defendants Huston.

(Filed Nov. 10, 1913.)

30 *Order Sustaining Demurrer and for Judgment.*

Now, on this 10th day of November, 1913, the above-entitled cause coming on regularly for hearing before the Hon. Edward E. Cushman, of the above-entitled court, upon the third amended bill of

complaint on file herein, and the demurrers thereto on the part of the defendants and the written stipulation of the parties hereto, by their respective attorneys, on file herein, stipulating that the demurrers filed by the defendants to the second amended bill shall stand as the demurrers of said defendants, and each of them, to the third amended bill, and the Court being fully advised,—

It is ordered that the said demurrers be, and they are hereby, sustained; and complainants thereupon by their counsel, Herbert S. Griggs, in open court, having elected to stand upon their said third amended bill of complaint, and refused to plead further,—

It is considered ordered and adjudged that the said third amended bill of complaint *and* this action be, and the same is hereby dismissed, and that the defendants herein, Raymond S. Gray and Sena Gray, his wife, W. A. Gray and Lois A. Gray, his wife, Charles S. Forbes and Adelaide F. Forbes, his wife, Frank L. Huston, John H. Patten and Dora W. Patten, his wife, W. W. Barr and Gertrude G. Barr, his wife, and Milwaukee Land Company, a corporation, do have and recover judgment against the plaintiffs W. H. Sawyer and Frances S. Sawyer, his wife, and Alfred C. Tuxbury and
31 Luna B. Tuxbury, his wife, for their costs and disbursements herein to be taxed.

It is further ordered and adjudged that all the testimony heretofore taken herein and filed with the referee and all papers and documents on file with the said referee be remanded and placed on file with the clerk of the above-entitled court.

To all of which the complainants by their counsel duly except, and such exception is allowed.

EDWARD E. CUSHMAN, *Judge.*

Dated Tacoma, Washington, November 10th, 1913.

(Filed Nov. 10, 1913.)

Order [Substituting Parties Complainant].

On suggestion of the complainants and upon stipulation signed by attorneys for all parties and on file herein, it appearing that since the commencement of this action Alfred C. Tuxbury, one of the complainants, has died, and that Luna B. Tuxbury and Charles Hill have been duly appointed executors of the estate of said deceased, and that said Luna B. Tuxbury, Edith E. Tuxbury Hill, Alice Bosworth Tuxbury and Luna Elizabeth Tuxbury are the sole heirs of the estate of said deceased, and should be substituted as parties complainant to the above-entitled cause in lieu of said Alfred C. Tuxbury, deceased,—

It is ordered that said substitution be made and the said ap-
32 pearance of said executors and heirs of said deceased may and shall be entered herein as parties complainant in lieu of said Alfred C. Tuxbury, deceased.

EDWARD E. CUSHMAN, *Judge.*

1/12/14.

(Filed Jan. 12, 1914.)

Assignment of Errors.

Now, this 2d day of February, 1914, come the complainants, by Herbert S. Griggs, their attorney and solicitor, and say: That the order and decree in the said cause entered herein by the Honorable E. E. Cushman, Judge, on November 10, 1913, is erroneous and against the just rights of these complainants for the following reasons:

I.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the complainants or their grantors, on the 29th day of March, 1900, made a valid forest lieu selection of the west half of section thirty-three (33), township eleven (11) north, range four (4) east of Willamette meridian, under and in accordance with the provisions of the act of Congress of June 4, 1897, and acts amendatory thereof and the customs, rules and regulations of the General Land Office and Land Department of the United States as set forth in said bill and particularly in paragraph IV thereof.

II.

The Court erred in sustaining the demurrer to complain-
33 ants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto the complainants or their grantors, on March 2, 1902, made a valid forest lieu selection of the lands in the preceding paragraph hereof described, under and in accordance with the provisions of the Act of Congress of June 4, 1897, and the Acts amendatory thereof, and the customs, rules and regulations of the Land Department and the General Land Office of the United States.

III.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto the forest lieu selection of the complainants, or their predecessors in interest, F. A. Hyde & Company, on March 29, 1900, of the lands described in paragraph I hereof was prior in time to and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly the defendants.

IV.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the forest lieu selection of complainants, or their predecessors in interest, made upon the lands described in paragraph I hereof, on March 2, 1902, was prior in

time to and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly the defendants.

34

V.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the pretended and attempted entries and applications for the purchase of all or portions of the land described in paragraph I hereof, made by the defendants or some of them, were each and all subsequent in time and inferior in right to the said forest lieu selections of the complainants or their predecessors in interest.

VI.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the forest lieu selections of the complainants, or their predecessors in interest, had been in compliance with and conformity to the Acts of Congress applicable thereto and the customs, rules, and regulations of the Land Department and General — Office of the United States applicable thereto, and by the transfer to complainants from their predecessors in interest, F. A. Hyde & Company, of all their rights to apply for forest lieu selections in lieu of the base land surrendered by said F. A. Hyde & Company to the United States in paragraphs IV and V of said Third Amended Bill of Complaint set forth, the complainants became the bona fide purchasers of said rights and under the forest lieu selections made by them thereunder as in paragraphs IV and V of the Third Amended Bill of Complaint stated, the complainants obtained a vested interest in the land so selected and which
35 land is described in paragraph I hereof.

VII.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the alleged entries and applications for the said land made by the defendants and the issuance of patents therefor, were made in contravention of the vested rights of the complainants herein.

VIII.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto the complainants were equitably entitled to be protected in the forest lieu selections which were made in the name of their predecessors in interest on the lands described in paragraph I hereof as against the claims of the defendants or any of them or any person or persons whomsoever.

IX.

The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto the complainants were equitably entitled to have the defendants declared trustees for the complainants of the lands described in paragraph I hereof.

X.

36 The Court erred in sustaining the demurrer to the complainants' Third Amended Bill of Complaint in that it did not hold that the rights and interests of the complainants in the said land described in paragraph I hereof, under the forest lieu selections made in the name of their predecessors in interest as set forth in paragraphs IV and V of the Third Amended Bill of Complaint and made *and* in accordance with the Act of Congress of June 4, 1897, and the customs, rules and regulations of the Land Department of the United States, had been recognized, approved, ratified and confirmed by the provisions of the Act of Congress of June 6, 1900; also by the provisions of the Act of Congress of March 3, 1901, and also by the provisions of the Act of Congress of March 3, 1905, and that the acts of the officials of the Land Department of the United States in attempting to disallow the said forest lieu selections made on March 29, 1900, and in neglecting to recognize, act upon, and approve the said forest lieu selections made on March 29, 1900, and in neglecting to recognize, act upon, and approve the said forest lieu selection made on March 2, 1902, and in thereafter attempting to receive and recognize the subsequent entries and applications for said land made by the defendants, or some of them, and in issuing patents for said land or some part thereof to the defendants, were each and all unauthorized, illegal and void and in contravention of the vested rights of the complainants in the said land.

XI.

37 The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint in that it did not hold that under the forest lieu selections made in the name of complainants' predecessors in interest as set forth in paragraphs IV and V of the Third Amended Bill of Complaint, the complainants became the bona fide purchasers and the equitable owners of the said land described in paragraph I hereof, and entitled to the issuance of a patent thereof to them or to their said predecessors in interest, F. A. Hyde & Company.

XII.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint in that it did not hold that by the admissions of the demurrer thereto, the several defendants at and before the time they attempted to enter upon and purchase the land de-

scribed in paragraph I hereof, they and each of them, had notice of the vested rights and interests therein of complainants and their predecessors in interest, and that the equitable interest of the complainants in and to the said land became vested by relation as of the dates of March 29, 1900, and March 2, 1902, and prior to the inception of any right or interest therein of the defendants, or any of them, or any other person, and that the equities of the complainants in the matter involved in said cause were and are superior to the equities of the defendants and declared trustees for the complainants, or their predecessors in interest, of the said lands described in paragraph I hereof.

XIII.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint in that it did not hold
38 that the said bill stated a good cause of action to which the defendants should be required to file their several answers or pleas.

XIV.

The Court erred in sustaining the demurrer to complainants' Third Amended Bill of Complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendants.

Wherefore complainants and appellants pray that the decree of the said Court be reversed and such directions be given that full force and efficacy inure to the complainants by reason of the cause of suit set up in their Third Amended Bill of Complaint filed in said cause and that a decree be entered in accordance with the prayer of complainants' Third Amended Bill of Complaint.

HERBERT S. GRIGGS,
Attorney and Solicitor for Complainants.

"Filed in the U. S. District Court, Western District of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk, by F. M. Harshberger, Deputy."

Petition for Appeal.

The above-named complainants, conceiving themselves aggrieved by the decree made and entered on the 10th day of November, 1913, in the above-entitled cause, do hereby appeal from said Order and Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Error, which is filed herewith, and they pray that this appeal may
39 be allowed and that a transcript of the records, proceedings and papers upon which said Order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Tacoma, Washington, this 31st day of January, 1914.

HERBERT S. GRIGGS,
Attorney for Complainants.

(Filed Feb. 3, 1914.)

Order Allowing Appeal [and Fixing Amount of Bond].

On petition of the complainants herein and on the motion of Herbert S. Griggs, their attorney, and upon the records and proceedings had and on file herein and the Assignment of Errors filed with the said petition,—

It Is Ordered that an appeal by the complainants from the order and judgment sustaining defendants' Demurrer to the Third Amended Bill of Complaint and dismissing the said cause entered herein on November —, 1913, to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby allowed, and

It Is Further Ordered that the said appeal is to operate as a supersedeas and stay upon the filing of a bond herein in the sum of Five Hundred Dollars, and Fidelity and Deposit Company of Maryland is hereby accepted on said bond as surety, and said bond is
40 now approved.

EDWARD E. CUSHMAN, *Judge.*

(Filed Feb. 3, 1914.)

Bond on Appeal.

Whereas in the above-numbered and entitled cause complainants W. H. Sawyer and Frances Sawyer, his wife, and Luna B. Tuxbury, wife of Alfred C. Tuxbury, deceased, and Luna B. Tuxbury and Charles Hill, as executors of the estate of Alfred C. Tuxbury, deceased, and Edith E. Tuxbury Hill, Alice Bosworth Tuxbury and Luna Elizabeth Tuxbury (having been substituted as complainants in lieu of said deceased), have petitioned for an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order and judgment of the Court entered in the above-entitled cause on the 10th day of November, 1913, and the said appeal has been allowed by the Honorable E. E. Cushman, Judge, of the above-entitled Court; and

Whereas, the said Court has fixed the security that the defendants shall give and furnish in the sum of Five Hundred and no/100 Dollars;

Now, Therefore, W. H. Sawyer and Frances Sawyer, his wife, and Luna B. Tuxbury, wife of Alfred C. Tuxbury, deceased, and Luna B. Tuxbury and Charles Hill, as executors of the estate of Alfred C. Tuxbury, deceased, and Edith E. Tuxbury Hill, Alice Bosworth Tuxbury and Luna Elizabeth Tuxbury, principals, and Amer-
41 ican Surety Company of New York, as surety, acknowledge themselves firmly bound unto the defendants in the sum of Hundred

E. E. C. Five [Thousand]* Dollars conditioned that the complainants W. H. Sawyer and Frances Sawyer, his wife, and Luna B. Tuxbury, wife of Alfred C. Tuxbury, deceased, and Luna B.

[* Word enclosed in brackets erased in copy.]

Tuxbury and Charles Hill, as executors of the estate of Alfred C. Tuxbury, and Luna Elizabeth Tuxbury, shall prosecute its said appeal to effect, and if it fail to make its plea good shall answer all costs. The surety heretofore named hereby expressly covenants and agrees that in case of a breach of any condition of this bond, the above-entitled court upon notice to the surety of not less than ten days shall proceed summarily in which said bond is given to ascertain the amount which the said surety is bound to pay on account of the breach thereof, and render judgment therefor against the surety and award execution thereof against the surety.

In Testimony Whereof, witness the names of the parties hereto affixed by their duly authorized agents and officers, this 2d day of February, 1914.

W. H. SAWYER AND
FRANCES SAWYER,
LUNA B. TUXBURY,
LUNA B. TUXBURY AND
CHAS. HILL, *as Ex., etc.,*
42 EDITH E. TUXBURY HILL,
ALICE BOSWORTH TUXBURY, AND
LUNA ELIZABETH TUXBURY,
By HERBERT S. GRIGGS,
Their Atty. and Agent.
AMERICAN SURETY COMPANY OF NEW YORK, *Surety,*
By FRANK ALLYN, JR.,
Resident Vice-President.

[Seal of Surety Company.]

Attest:

C. E. DUNKLEBERGER,
Resident Asst. Secretary.

(Filed Feb. 3, 1914.)

Citation on Appeal.

To Raymond S. Gray and Sena Gray, His Wife; W. A. Gray and Lois A. Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife; and Milwaukee Land Company, a Corporation, Defendants, Greeting:

Whereas, W. H. Sawyer et al., appellants in the above-entitled suit, have lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the Western District of Washington, Western Division, made in favor of you, the defendants in the above-entitled cause, and have filed the security required by

law, you are therefore hereby cited to appear before the said
43 United States Circuit Court of Appeals at the city of San Francisco, State of California, on the 4th day of March, 1914, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the city of Tacoma, in the Ninth Judicial Circuit, this 2d day of February, in the year of our Lord one thousand nine hundred fourteen.

[SEAL.] EDWARD E. CUSHMAN,
Judge of the District Court of the United States.

(Filed Feb. 3, 1914.)

[*Certificate of Clerk U. S. District Court to Transcript.*]

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return to the claim of appeal of W. H. Sawyer and Frances Sawyer, his wife et al., in a cause pending in said court wherein W. H. Sawyer et al. are complainants and appellants and Raymond S. Gray et al. are respondents and appellees, that the above and foregoing is a true copy of all papers filed and proceedings had and entered in said cause as the same appear on file and of record in my office, pursuant to stipulation of counsel filed herein; that I have compared the same with the originals and they are true and correct transcripts therefrom.

I further certify that I attach hereto and herewith transmit
44 the original Citation with return thereon;

I further certify that the cost of preparing and certifying said transcript amounts to the sum of $27.70, which amount has been paid to me by the solicitor for appellants.

In Testimony Whereof, I have hereto set my hand and affixed the seal of this court at Tacoma, in said District, this 23d day of February, A. D. 1914.

[SEAL.] FRANK L. CROSBY, *Clerk.*

Citation on Appeal [Original].

In the District Court of the United States for the Western District of Washington, Western Division.

No. 1696.

W. H. SAWYER et al., Complainants,
vs.
RAYMOND S. GRAY et al., Defendants.

To Raymond S. Gray and Sena Gray, His Wife; W. A. Gray and Lois A. Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife; and Milwaukee Land Company, a Corporation, Defendants, Greeting:

Whereas, W. H. Sawyer et al., appellants in the above-entitled suit, have lately appealed to the United States Circuit Court
45 of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the Western District of Washington, Western Division, made in favor of you, the defendants in the above-entitled cause, and have filed the security required by law; you are therefore hereby cited to appear before the said United States Circuit Court of Appeals at the city of San Francisco, State of California, on the 4th day of March, 1914, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the city of Tacoma, in the Ninth Judicial Circuit, this 2d day of February, in the year of our Lord one thousand nine hundred fourteen.

[SEAL.] EDWARD E. CUSHMAN,
Judge of the District Court of the United States.

[*Admission of Service of Citation on Appeal, etc.*]

Chicago, Milwaukee & St. Paul Railway Company.

Legal Department.

SEATTLE, February 6, 1914.

Mr. Herbert S. Griggs, Tacoma, Wash.

DEAR SIR: This will acknowledge receipt of your letter of the 4th inst., enclosing copies of the papers hereinafter designated in the case of W. H. Sawyer et al. vs. Raymond S. Gray et al., viz.:

Citation on appeal;
Order allowing appeal;
46 Petition for appeal;
Bond of appeal;

Assignment of errors;
Suggestion on the death of one of complainants and
Order of substitution.

Very truly yours,

F. M. DUDLEY,
General Attorney.

F. M. D.–p.

No. 1696. Dist. Ct. U. S., West. Dist. Wn., West. Div.

[Endorsed:] No. 1696. In the United States District Court, Western District of Washington. W. H. Sawyer et al., Complainants, vs. Raymond S. Gray et al., Defendants. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed:] No. 2385. United States Circuit Court of Appeals for the Ninth Circuit. W. H. Sawyer and Frances Sawyer, His Wife, and Alfred C. Tuxbury and Luna B. Tuxbury, His Wife, Appellants, vs. Raymond S. Gray and Sena Gray, His Wife, W. A. Gray and Lois A. Gray, His Wife, Charles S. Forbes and Adelaide F. Forbes, His Wife, Frank L. Huston, John H. Patten and Dora W. Patten, His Wife, W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees. Transcript
47 of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Received February 28, 1914.

F. D. MONCKTON, *Clerk.*

Filed March 5, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit,
By MEREDITH SAWYER,
Deputy Clerk.

[Endorsed:] United States Circuit Court of Appeals for the Ninth Circuit. W. H. Sawyer and Frances Sawyer, His Wife, and Alfred T. Tuxbury, and Luna B. Tuxbury, His Wife, Appellants, vs. Raymond S. Gray and Sena Gray, His Wife, W. A. Gray and Lois A. Gray, His Wife, Charles S. Forbes and Adelaide F. Forbes, His Wife, Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife, W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division. Filed Apr. 24 1914. (Signed) F. D. Monckton, Clerk.

48 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER et ux. et al., Appellants,
vs.
RAYMOND S. GRAY et al., Appellees.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

48½ United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER et ux. et al., Appellants,
vs.
RAYMOND S. GRAY et ux. et al., Appellees.

Index to Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

49 & 50 At a Stated Term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Thursday, the Fourteenth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable Charles E. Wolverton, District Judge.

No. 2385.

W. H. SAWYER and FRANCIS SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,

vs.

RAYMOND S. GRAY et al., Appellees.

Order of Submission.

The appeal in the above-entitled cause having this day been called for hearing in its regular order, and there being no appearance in open Court of counsel for or on behalf of either party thereto, Ordered, appeal and Proposed Form of Opinion and Decree in the above-entitled cause submitted to the Court for consideration and decision.

51 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and Lois A. Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees.

Appeal from the United States District Court for the Western District of Washington, Second Division.

[*Opinion U. S. Circuit Court of Appeals.*]

H. S. Griggs, Esq., for the appellants.
F. M. Dudley, Esq., Peters & Powell, W. A. Reynolds, Esq., and C. E. Moulton, Esq., for appellees.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

GILBERT, *Circuit Judge:*

The questions arising in this case from the allegations of the third amended bill of complaint and the demurrers thereto are the

questions that were presented to this Court in Daniels v.
52 Manning, No. 2226, and decided by this Court on May 5, 1913 (205 Fed. 235). Decision is controlled by the principles announced in that cause, and the decree of the court below herein will be affirmed.

[Endorsed:] Opinion, U. S. Circuit Court of Appeals. Filed Jun- 1, 1914. (Signed) F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

53 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and Lois A. Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

[*Decree U. S. Circuit Court of Appeals.*]

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellees and against the appellants.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellants for their costs herein expended, and have execution therefor.

[Endorsed:] Decree. Filed and Entered June 1, 1914. (Signed) F. D. Monckton, Clerk.

54 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER et al., Appellants,

vs.

RAYMOND S. GRAY et al., Appellees.

Præcipe for Filing Stipulation.

To the clerk of the above-entitled court:

Please file in the above entitled cause the annexed certified copy of original stipulation entered and filed in the original case in the United States District Court for the Western District of Washington.

(Signed) HERBERT S. GRIGGS,
Attorney for W. H. Sawyer et al., Appellants.

In the District Court of the United States for the Western District of Washington, Western Division.

No. 1696.

W. H. SAWYER et al., Complainants,
vs.
RAYMOND S. GRAY et al., Defendants.

Stipulation.

It is hereby stipulated by and between the plaintiffs, W. H. Sawyer, et al., by their attorney Herbert S. Griggs, and the defendants W. W. Barr and Gertrude G. Barr, his wife, by their attorneys Peters & Powell, that

Whereas a compromise and adjustment of all matters at issue herein has been had between the plaintiffs and defendants W. W. Barr and Gertrude G. Barr, his wife, whereby all right, claim, title and interest in and to the hereinafter described portion of the property described in the complaint, of and belonging to said defendants, has been sold, assigned and conveyed to said W. H. Sawyer, to-wit, the West half of the Southwest Quarter and the Southeast Quarter of the Southwest Quarter of Section 32, Township 11 North Range 4 East.

Now, therefore, it is hereby stipulated and agreed that a stipulation may be filed herein withdrawing the said lands, and all litigation with respect thereto, from this cause, the same as if the said last above described lands had not been mentioned or referred to in the pleadings herein.

It is further stipulated and agreed that the said W. H. Sawyer, et al., plaintiffs, shall not recover any costs or disbursements herein against the said defendants W. W. Barr and Gertrude G. Barr, his wife; and that the said defendants W. W. Barr and Gertrude G. Barr, his wife, do not recover any costs or judgments herein against the plaintiffs, or any of them.

All of the other defendants in the above entitled cause hereby approve of and consent to the foregoing stipulation, and to the filing thereof in the above entitled court, and that the case be continued as to the balance of the land involved.

(Signed) HERBERT S. GRIGGS,
Att'y for W. H. Sawyer et al.

(Signed) PETERS & POWELL,
Att'y- for W. W. Barr and Gertrude G. Barr, His Wife.

(Signed) W. A. REYNOLDS,
Att'ys for Raymond S. Gray and Sena Gray, His Wife; W. A. Gray and Lois A. Gray, His Wife.

Dated, June 24th, 1914.

The defendant, Milwaukee Land Company, hereby consents to the filing of the foregoing stipulation and to the dismissal of said proceedings as to the west half of the southwest quarter and the southeast quarter of the southwest quarter of section 32, township 11 north of range 4 East, without prejudice thereby to any claims which the appellants may have to other lands described in the amended bills of complaint herein, and stipulates that the dismissal of said action so far as it affects the said west half of the southwest quarter and the southeast quarter of the southwest quarter of section 32 aforesaid may be ordered without prejudice to any rights which the appellants may have to prosecute this action against the remaining defendants and with respect to any other lands involved therein.

(Signed) F. M. DUDLEY,
Attorney for Milwaukee Land Co.

57 The defendants, Frank L. Huston, John H. Patten and Dora W. Patten, his wife, Chas. S. Forbes and Adelaide F. Forbes, his wife, hereby consent to the filing of the foregoing stipulation and to the dismissal of said proceeding as to the West half of the Southwest quarter, and the Southeast quarter of the Southwest Quarter of Section 32, Township 11 North, Range 4 East, W. M., without prejudice thereby to any claims which the appellants may have to other lands described in the amended bills of complaint herein, and stipulate that the dismissal of said action so far as it affects the said West half of the Southwest Quarter and the Southeast Quarter of the Southwest Quarter of Section 32, aforesaid, may be ordered without prejudice to any rights which the appellants may have to prosecute this action against the remaining defendants and with respect to any other lands involved therein.

(Signed) C. E. MOULTON,
Attorney for Frank L. Huston, John H. Patten and Dora W. Patten, His Wife, and Chas. S. Forbes and Adelaide F. Forbes, His Wife.

June 24, 1914.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original stipulation in the foregoing entitled cause, now on file and of record in my office at Tacoma, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court, this 6th day of July, 1914.

(Signed) FRANK L. CROSBY, *Clerk,*
By F. M. HARSHBERGER,
Deputy. [SEAL.]

[Endorsed:] No. 1696-C. In the District Court of the United States for the Western District of Washington. W. H. Sawyer et al. Complainants vs. Raymond S. Gray et al., Defendants. Certified Copy of Stipulation. No. 2385 United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul- 11 1914. F. D. Monckton, Clerk.

58 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER and FRANCES SAWYER, His Wife; and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and Lois A. Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John Patten and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees.

Petition for Allowance of Appeal to Supreme Court of the United States.

The above mentioned appellants, W. H. Sawyer and Frances Sawyer, his wife, et al., respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit and that a decree has therein been rendered on the 1st day of June A. D. 1914, affirming the decree of the United States District Court for the Western District of Washington, Southern Division, and that the matter in controversy in said suit involves more than $1,000.00 besides costs. That this cause is one involving the construction and application of a statute of the United States, to wit: Act of June 4, 1897, 30 Statutes at Large, 36, (United States Compiled Statutes 1901, page 1541), and other acts of the United States amendatory thereof and in which the decree of the United States Circuit Court of Appeals for the Ninth Circuit is not final and is a proper cause to be appealed to the Supreme Court of the United States.

59 The above named appellants, conceiving themselves aggrieved by the decree made and entered in the above entitled court and cause on the said 1st day of June A. D. 1914, do hereby appeal from said decree to the United States Supreme Court for the reasons specified in the Assignment of Errors which is filed herewith.

Wherefore the said appellants pray that an appeal be allowed in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send a record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said ap-

pellants may be reviewed and if error be found corrected according to the laws and customs of the United States.

(Signed) HERBERT S. GRIGGS,
Solicitors for Appellants.

Due service of copy of foregoing petition is hereby acknowledged this — day of ——, 1914.

——— ———,
Solicitors for Apprllees.

[Endorsed:] Petition for Allowance of Appeal to Supreme Court of the United States. Filed Jul- 28 1914. F. D. Monckton, Clerk.

60 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and Lois A. Gray, His Wife; Charles F. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees.

Order Allowing Appeal to Supreme Court of the United States and Fixing Amount of Bond.

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States on behalf of the said appellants be and the same is hereby allowed as prayed for and it is further ordered that the amount of the appeal and supersedeas bond be and the same is hereby fixed at five hundred dollars.

Dated this 28 day of July 1914.

(Signed) WM. W. MORROW,
United States Circuit Judge, Ninth Circuit.

[Endorsed:] Order Allowing Appeal to Supreme Court of the United States and Fixing Amount of Bond. Filed Jul- 28 1914. F. D. Monckton, Clerk.

61 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and Lois A. Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees.

[*Bond on Appeal to Supreme Court U. S. and Order of Approval.*]

Know all men by these presents: That we, W. H. Sawyer and Frances Sawyer, his wife, and Herbert S. Griggs as principals and American Surety Company of New York, a corporation, as surety are held and firmly bound unto the appellees in the above entitled cause in the sum of Five Hundred ($500.00) Dollars, lawful money of the United States of America to be paid to the said appellees, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals this 28th day of July, 1914.

Whereas, the appellants in the above entitled suit are prosecuting an appeal to the United States Supreme Court to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Ninth Circuit on the 1st day of June, 1914;

62 Now, therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise to remain in full force and effect.

W. H. SAWYER ET AL.,
Appellants,

(Signed) By HERBERT S. GRIGGS,
Their Solicitor.

(Signed) HERBERT S. GRIGGS.

AMERICAN SURETY COMPANY OF NEW YORK,

(Signed) By H. J. DOUGLAS,
[SEAL.] *Resident Vice-President.*

(Signed) V. H. GALLOWAY,
Resident Assistant Secretary.

Examined and approved and the surety upon the within bond approved this 29 day of July, 1914.

(Signed) WM. W. MORROW,
Circuit Judge for the Ninth Circuit.

[Endorsed:] Bond on Appeal to Supreme Court U. S. and Order of Approval. Filed Jul- 29, 1914. F. D. Monckton, Clerk.

63 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and Lois A. Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees.

Assignment of Errors on Appeal to Supreme Court of the United States.

Come now the appellants, W. H. Sawyer and Frances Sawyer, his wife, et al., by Herbert S. Griggs their solicitor and say:

That in the records and proceedings herein there is manifest error and assigns error thereto as follows:

The United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree of the United States District Court for the Western District of Washington, Southern Division, sustaining the demurrer of appellees to appellants' Third Amended Bill of Complaint and dismissing appellants' Amended Bill of Complaint for the following reasons:

I.

Because the demurrer to appellants' Third Amended Bill of Complaint admits that on March 29, 1909, the appellants or their grantors made a valid forest lieu selection of the West Half of Section 33, Township 11 North, Range 4 East of Willamette Meridian,
64 under and in accordance with the provisions of the Act of Congress of June 4, 1897, and the acts amendatory thereof and the customs, rules and regulations of the General Land Office and Land Department of the United States as set forth in said Bill and particularly in Paragraph IV thereof.

II.

Because the demurrer to appellants' Third Amended Bill of Complaint admits that the complainants or their grantors, on March 2, 1902, made a valid forest lieu selection of the lands in the preceding paragraph hereof described, under and in accordance with the provisions of the Act of Congress of June 4, 1897, and the acts amendatory thereof, and the customs, rules and regulations of the Land Department and the General Land Office of the United States.

III.

Because the demurrer to appellants' Third Amended Bill of Complaint admits that the forest lieu selection of the Complainants, or their predecessors in interest, F. A. Hyde & Company, on March 29, 1900, of the lands described in paragraph I hereof was prior in time to and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly the defendants.

IV.

Because the demurrer to appellants' Third Amended Bill of Complaint admits that the forest lieu selection of complainants, or their predecessors in interest, made upon the lands described in paragraph I hereof, on March 2, 1902, was prior in time to and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly the defendants.

V.

Because the demurrer to appellants' Third Amended Bill
65 of Complaint admits that the pretended and attempted entries and applications for the purchase of all or portions of the land described in paragraph I hereof, made by the defendants or some of them, were each and all subsequent in time and inferior in right to the said forest lieu selections of the complainants or their predecessors in interest.

VI.

Because the demurrer to appellants' Third Amended Bill of Complaint admits that the forest lieu selections of the appellants, or their predecessors in interest, had been in compliance with and conformity to the Acts of Congress applicable thereto and the customs, rules and regulations of the Land Department and General Office of the United States applicable thereto, and by the transfer to complainants from their predecessors in interest, F. A. Hyde & Company, of all their rights to apply for forest lieu selections in lieu of the base land surrendered by said F. A. Hyde & Company to the United States in paragraphs IV and V of said Third Amended Bill of Complaint set forth, the complainants became the bona fide purchasers of said rights and under the forest lieu selections made by them thereunder as in paragraphs IV. and V. of the Third Amended Bill of Complaint stated, the complainants obtained a vested interest in the land so selected and which land is described in paragraph I hereof.

VII.

Because the demurrer to the appellants' Third Amended Bill of Complaint admits that the alleged entries and applications for the said land made by the defendants and the issuance of patents therefor, were made in contravention of the vested rights of the complainants herein.

66

VIII.

Because the demurrer to the appellants' Third Amended Bill of Complaint admits that the appellants were equitably entitled to be protected in the forest lieu selections which were made in the name of their predecessors in interest on the lands described in paragraph I hereof as (33) against the claims of the defendants or any of them or any person or persons whomsoever.

IX.

Because the demurrer to the appellants' Third Amended Bill of Complaint admits that the appellants were equitably entitled to have the defendants declared trustees for the complainants of the lands described in paragraph I hereof.

X.

Because the Court did not affirmatively hold and decree that the rights and interests of the appellants in the said land described in paragraph I hereof, under the forest lieu selections made in the name of their predecessors in interest as set forth in paragraphs IV and V of the Third Amended Bill of Complaint and made and in accordance with the Act of Congress of June 4, 1897, and the customs, rules and regulations of the Land Department of the United States, had been recognized, approved, ratified and confirmed by the provisions of the Act of Congress of June 6, 1900; also by the provisions of the Act of Congress of March 3, 1901, and also by the provisions of the Act of Congress of March 3, 1905, and that the acts of the officials of the Land Department of the United States in attempting to disallow the said forest lieu selections made on March 29, 1900, and in neglecting to recognize, act upon, and approve the said forest lieu selection made on March 2, 1902, and in
67 thereafter attempting to receive and recognize the subsequent entries and applications for said land made by the defendants, or some of them, and in issuing patents for said land or some (34) part thereof to the defendants, were each and all unauthorized, illegal and void and in contravention of the vested rights of the complainants in the said land.

XI.

Because the Court did not affirmatively hold and decree that under the forest lieu selections made in the name of appellants' predecessors in interest as set forth in paragraphs IV and V of the Third Amended Bill of Complaint, the complainants became the bona fide purchasers and the equitable owners of the said land described in paragraph I hereof, and entitled to the issuance of a patent thereof to them or to their said predecessors in interest, F. A. Hyde & Company.

XII.

Because the Court did not affirmatively hold and decree that by the admissions of the demurrer thereto, the several defendants at and before the time they attempted to enter upon and purchase the land described in paragraph I hereof, they and each of them, had notice of the vested rights and interests therein of complainants and their predecessors in interest, and that the equitable interest of the complainants in and to the said land became vested by relation as of the dates of March 29, 1900, and March 2, 1902, and prior to the inception of any right or interest therein of the defendants, or any of them, or any other person, and that the equities of the complainants in the matter involved in said cause were and are superior to
the equities of the defendants and declared trustees for the
68 complainants, or their predecessors in interest, of the said lands described in paragraph I hereof.

XIII.

Because the appellants' Third Amended Bill of Complaint stated a good cause of suit to which the appellees should have been required to file answers or pleas.

XIV.

Because the decree of said District Court should have been reversed and the demurrer to appellants' Third Amended Bill of Complaint overruled.

Wherefore, appellants pray that the decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed and such directions be given that force and efficacy may innure to the appellants by reason of the cause of suit set up in their Third Amended Bill of Complaint filed in said cause and that a decree be entered in accordance with the prayer of the appellants' Third Amended Bill of Complaint.

(Signed) HERBERT S. GRIGGS,
Solicitor for Appellants.

Rec'd copy.

——— ———,
Solicitor for Appellees.

[Endorsed:] Assignment of Errors on Appeal to Supreme Court of the United States. Filed Jul- 28, 1914. F. D. Monckton, Clerk.

69 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and Lois A. Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees.

Præcipe for Record on Appeal to the Supreme Court of the United States.

To the Clerk of said Court:

SIR: Please issue a certified transcript of the record on appeal to the Supreme Court of the United States in the above entitled cause consisting of the following:

1. Copy of printed transcript of record on which case was heard in the Circuit Court of Appeals, to which will be added a copy of the following entitled papers that were filed and all the proceedings that were had in said Circuit Court of Appeals.
2. Order of submission.
3. Decree.
4. Petition for appeal to Supreme Court of the United States and order thereon.
5. Bond on appeal to Supreme Court of the United States.
6. Assignment of Errors.
7. Præcipe for certified transcript of record on appeal to Supreme Court of the United States.
8. Certificate of Clerk of United States Circuit Court of Appeals to transcript of record on appeal to Supreme Court of United
70 States.
9. Original citation on appeal to Supreme Court of the United States.
10. All stipulations on file.

(Signed) HERBERT S. GRIGGS,
Att'y for Appellants.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit Court, ss:

Due service of within Præcipe for transcript on appeal to Supreme Court of the United States is hereby acknowledged and certified copy thereof received at Seattle, Washington, this 4th day of August, 1914.

(Signed) F. M. DUDLEY,
Of Solicitors for Appellees Milwaukee Land Company.

Due service of the within Præcipe for transcript on appeal to Supreme Court of the United States is hereby acknowledged and certified copy thereof received at Portland, Oregon, this 26th day of August, 1914, also admitting due service at same time and place of citation on appeal. Petition for and order allowing appeal and Assignment of Errors.

(Signed) C. E. MOULTON,
Solicitors for Appellees Chas. S. Forbes et ux. and Frank L. Huston, John H. Patten et ux.

[Endorsed:] Præcipe for Record on Appeal to the Supreme Court of *of* the United States. Filed Sep. 4, 1914. F. D. Monckton, Clerk.

71 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,
vs.
RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and Lois A. Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy (70) pages, numbered from and including 1 to and including 70, to be a true copy of the complete record made pursuant to the præcipe filed by counsel for the appellants on the 4th day of September, A. D. 1914, under Rule 8 of the Supreme Court of the United States in the above-entitled case, including the Assignment of Errors on Appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinion, filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record on Appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to the said præcipe.

Attest my hand and the Seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this fourteenth day of September, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

72 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2385.

W. H. SAWYER and FRANCES SAWYER, His Wife, and ALFRED C. TUXBURY and LUNA B. TUXBURY, His Wife, Appellants,

vs.

RAYMOND S. GRAY and SENA GRAY, His Wife; W. A. GRAY and Lois Gray, His Wife; Charles S. Forbes and Adelaide F. Forbes, His Wife; Frank L. Huston, John H. Patten, and Dora W. Patten, His Wife; W. W. Barr and Gertrude G. Barr, His Wife, and Milwaukee Land Company, a Corporation, Appellees.

Citation on Appeal to Supreme Court of the United States.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit Court, ss:

To Raymond S. Gray and Sena Gray, his wife; W. A. Gray and Lois A. Gray, his wife; Charles S. Forbes and Adelaide F. Forbes, his wife; Frank L. Huston, John H. Patten, and Dora W. Patten, his wife; W. W. Barr and Gertrude G. Barr, his wife, and Milwaukee Land Company, a corporation, Appellees, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington in the District of Columbia, sixty (60) days after the date of this citation, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein W. H. Sawyer and Frances Sawyer, his wife, et al., are appellants and you are appellees, to show cause if any there be why the decree rendered against said appellants as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Wm. W. Morrow, Judge of the
73 United States Circuit Court of Appeals for the Ninth Circuit this 28 day of July A. D. 1914.

WM. W. MORROW,
Circuit Judge.

74 UNITED STATES OF AMERICA,
Ninth Judicial Circuit Court, ss:

Due service of the within Citation to the appellees is hereby acknowledged and certified copies thereof received at Portland, Oregon the 26th day of August 1914.

C. E. MOULTON,
Of Solicitors for Appellees Chas. S. Forbes et ux., John H. Patten et ux., and Frank L. Huston.

Service of within citation to appellees is hereby acknowledged and certified copy thereof received at Seattle, Washington, this 4th day of August, 1914.

F. M. DUDLEY,
Solicitor for Appellee Milwaukee Land Co.

Due service of the within Citation on appeal to Supreme Court of the United States is hereby acknowledged, and certified copy thereof received at Chehalis, Washington, this 26th day of August, 1914, also admitting due service at same time and place of Præcipe for Appeal, Petition for and Order allowing appeal and Assignment of Errors.

C. E. MOULTON,
Solicitors for Appellees Chas S. Forbes et ux., John H. Patten et ux., and Frank L. Huston.

75 [Endorsed:] Docketed. No. 2385. United States Circuit Court of Appeals. W. H. Sawyer et al., Appellants, vs. Raymond S. Gray et al., Appellees. Citation on appeal to Supreme Court of the United States. Filed Sep. 4, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Herbert S. Griggs, 1115 Fidelity Bldg., Tacoma, Washington, Attorney for Appellants.

Endorsed on cover: File No. 24,376. U. S. Circuit Court Appeals, 9th Circuit. Term No. 632. W. H. Sawyer and Frances Sawyer, his wife, and Alfred C. Tuxbury and Luna B. Tuxbury, his wife, appellants, vs. Raymond S. Gray and Sena Gray, his wife, et al. Filed September 24th, 1914. File No. 24,376.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 632.

W. H. SAWYER AND FRANCES SAWYER, HIS WIFE, AND ALFRED C. TUXBURY AND LENA B. TUXBURY, HIS WIFE, APPELLANTS,

vs.

RAYMOND S. GRAY AND SENA GRAY, HIS WIFE, ET AL., APPELLEES.

MOTION TO ADVANCE.

Come now the above-named appellants and respectfully move this honorable court to advance this cause for hearing immediately after the hearing of cases 234 to 248, inclusive.

It will appear from the record herein that both the United States District Court for the Western District of Washington, Southern Division, and the United States Circuit Court of Appeals for the Ninth Circuit rendered judgments against these appellants solely upon the ground that the questions were controlled by the principles announced by the Circuit

Court of Appeals for the Ninth Circuit, May 5, 1913, in the case of Daniels *vs.* Wagner (205 Fed. Rep., 235), and this after decision of the District Court, W. D. Washington, S. D., in favor of appellants on the merits.

Sawyer *et al. vs.* Gray *et al.*, 205 Fed. Rep., 160.

The case of Daniels *vs.* Wagner and companion cases are all before this court on appeal, being Nos. 234 to 248, inclusive, and in order that this cause, involving similar questions of law, may be argued, submitted and considered at the same time we respectfully submit that this cause may be advanced for argument and be set for hearing immediately following 234 to 248, inclusive.

ALEX. BRITTON,
EVANS BROWNE,
FRANCIS W. CLEMENTS,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 632.

W. H. SAWYER AND FRANCES SAWYER, His Wife, AND ALFRED C. TUXBURY AND LENA B. TUXBURY, His Wife, APPELLANTS,

vs.

RAYMOND S. GRAY AND SENA GRAY, His Wife, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Stipulation.

It is hereby stipulated by and between the plaintiffs W. H. Sawyer et al., by their attorney, Francis W. Clements, and the defendant, The Milwaukee Land Company, by H. H. Field, its attorney, that the value of the property the subject of this suit at the time of the filing of the bill of complaint herein in the district court, was in excess of the sum of $3,000.

FRANCIS W. CLEMENTS,
Att'y for Plaintiffs in Error.
H. H. FIELD,
Att'y for The Milwaukee Land Co.

UNITED STATES DISTRICT COURT.

DISTRICT OF ——.

W. H. SAWYER ET AL.

vs.

RAYMOND S. GRAY ET AL.

Supplemental Affidavit in Behalf of Plaintiff.

And now comes Charles Hill, of Montclair, in the State of New Jersey, and on oath deposes and says that he is familiar with the land in controversy in this action; that for several years last past he has acted as agent for the plaintiff and has personally been upon the land and examined the same; that the value of the land comprised in west half section 32, township 11 north, of range 4 east, Willamette Meridian, State of Washington, which is the land in controversy in the above-entitled action, on February 3, 1914, exceeded three thousand (3,000) dollars.

CHARLES HILL.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, MASS., April 20, 1915.

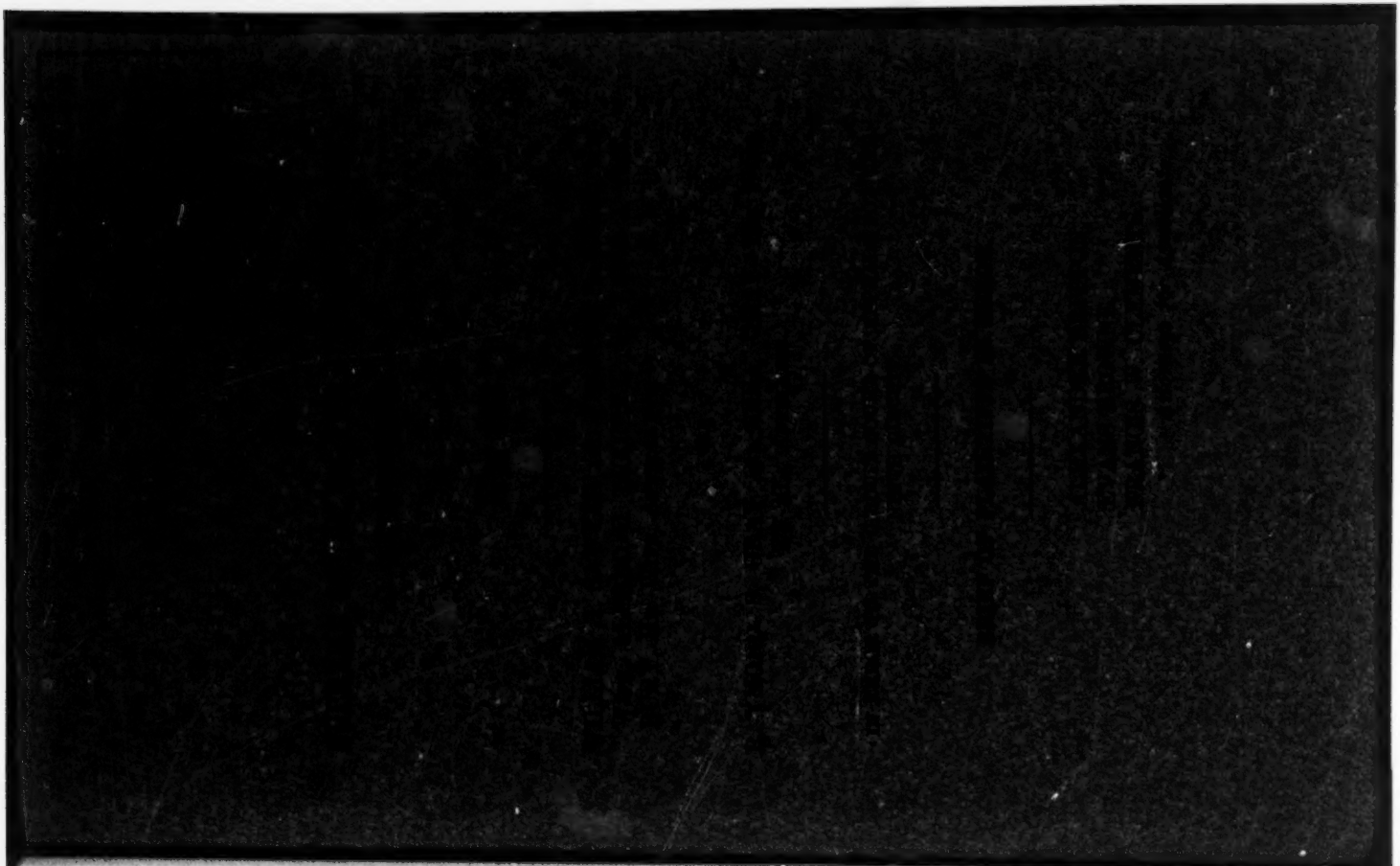
Then personally appeared Charles Hill, to me personally known, and made oath to the truth of the foregoing statement by him subscribed before me.

[Seal Eugene C. Upton, Notary Public, Commonwealth Massachusetts, U. S. A.]

EUGENE C. UPTON,
Notary Public.

Commission expires November 18, 1915.

[Endorsed:] W. H. Sawyer et al. vs. Raymond S. Gray et al. Supplemental affidavit in behalf of plaintiff.



SUBJECT INDEX.

STATUTES, REGULATIONS, AND AUTHORITIES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 632.

WILLIAM H. SAWYER AND FRANCES SAWYER, HIS WIFE; ALFRED C. TUXBURY AND LENA C. TUXBURY, HIS WIFE, APPELLANTS,

vs.

RAYMOND S. GRAY AND SENA GRAY, HIS WIFE, ET AL., APPELLEES.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PLAINTIFFS IN ERROR.

Statement.

This is a suit in equity to have the claimants under certain patents issued by the United States declared trustees to hold the title thus obtained to public lands in trust for the plaintiffs, who claim under rights initiated in these lands

long prior to the initiation of the claims under which the patents were issued.

As originally instituted in the District Court for the Western District of the State of Washington, Western Division, the suit involved the W. ½ of section 32, T. 11 N., R. 4 E., in the Vancouver Land District, State of Washington.

A compromise was later entered between the plaintiffs and the defendants, W. W. Barr and Gertrude G. Barr, his wife, through which said defendants conveyed the land held by them under patent from the United States to the plaintiffs, namely, the W. ½ of S. W. ¼ and the S. E. ¼ of S. W. ¼ of said section 32 whereupon a stipulation was entered into, with consent of all the parties, withdrawing said lands and all litigation with respect thereto from this case, so that it results that the lands now involved by the suit are the N. W. ¼ and the N. E. ¼ S. W.¼ of said section 32, T. 11 N., R. 4 E.

To the amended bill as filed a demurrer was interposed, which was sustained, and upon plaintiffs' refusal to further plead their amended bill was dismissed for want of equity. On appeal to the Circuit Court of Appeals for the Ninth Circuit the decree of the court below was affirmed, and the case comes before this court on appeal from the decision of the Circuit Court of Appeals.

The claim of the plaintiffs in error with respect to these lands arises upon the following state of facts:

By the act of Congress approved June 4, 1897 (30 Stats., 34), it was provided:

> "That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent, is included within the limits of a public forest reserve, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof, a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issue of patent to cover the tract selected."

The regulations issued by the Secretary of the Interior under the above provision of law will be found in the circular of June 30, 1897, 24 L. D., 589. By these regulations one owning a tract of land within the limits of a national forest and being desirous of exchanging the same for lands without the forest was required to convey the tract held within the forest, duly record the conveyance, and with his application to select, which must be filed in the district land office in which the land desired is situate, to file evidence of the conveyance of the land owned within the forest, together with an abstract of title showing a clear right in the United States to the land thus surrendered as a base for the selection. All such applications were to be forwarded by the local officers to the Commissioner of the General Land Office, together with report as to the status of the tract applied for.

Acting under these regulations the owners of certain lands, amounting to 1,120 acres, included within the exterior limits of the Pine Mountain Zaca Lake Forest Reserve, duly conveyed the lands thus owned to the United States, and made due public record of the conveyance prior to March 29, 1900, and on that day filed with the local land officers at Vancouver, in the State of Washington, formal selection, embracing a like amount of land, of which the tract in question formed a part, the application being accompanied by due proof, in all respects meeting the regulations in force governing selections under the said act of June 4, 1897. The application or selection thus presented was received by the local officers and duly forwarded to the Commissioner of the General Land Office (Record, p. 6).

Prior to the filing of this application, to wit, on January 25, 1899, the State of Washington applied for the survey of this township under the provisions of the act of August 18, 1894, 28 Stats., 372, 394. By said act several named States, including the State of Washington, upon applying for the survey of any given township and otherwise complying with the provisions of said act were granted the preferential right

of selection from the lands to be surveyed, for the period of sixty days following the date of the filing of the township plat in the proper district land office (Record, p. 5).

Although not stated in the record in this case the records of the General Land Office will show that a contract was entered into for the survey of this township June 6, 1899, and that the subdivisional surveys of the township by which the section lines were determined were made between July 28 and September 2, 1899, more than six months prior to the filing of the forest lieu selection on March 29, 1900, and the plat of the survey of the township was approved by the Surveyor General June 14, 1900.

The approved plat of the survey of the township was filed in the local land office April 10, 1901, and the sixty days of preferential or exclusive right of selection granted the State expired June 9, 1901. Prior to this time, to wit, on June 6, 1901, the State made its selections within this township, but did not embrace within its list the said W. ½ of section 32, the tract in suit, nor was any selection ever made by the State of this land (Record, p. 5).

The act of June 4, 1897, *supra*, under which was made the selection under which appellant claims, permitted selection of either surveyed or unsurveyed lands. Further, as will be seen, the subdivisional surveys of the township, by which the section lines were identified, had been actually made in the field for nearly a year before the selection of March 29, 1900, was filed. No action was taken by the Land Department upon the selection of March 29, 1900, until on December 21, 1901, more than six months after the State's preferential right of selection had expired, when, by decision of the Commissioner of the General Land Office, the selection was rejected, solely upon the ground that because the period of preferential right granted the State under the act of August 18, 1894 (*supra*), had not expired at date of filing the forest lieu selection the land was not subject to the selection (Record, p. 7).

Appeal was taken to the Secretary of the Interior and, during the pendency of the appeal and after the expiration of the preferential right granted the State, to wit, on March 3, 1902, a second selection was proffered in plaintiffs' behalf of the W. ½ of section 32, accompanied by a showing in every wise meeting the departmental requirements in the matter of selections under the act of June 4, 1897, and this second selection was duly forwarded by the local land officers to the Commissioner of the General Land Office (Record, p. 8).

The Secretary of the Interior in his decision of May 23, 1902, not reported, affirmed the action of the Commissioner of the General Land Office in rejecting the selection of March 29, 1900, but called attention to the fact of the filing of the second selection, which was returned with the record on the appeal for the consideration of the Commissioner of the General Land Office. A copy of the said decision of the Secretary of the Interior is appended hereto.

The selections here in question under the act of June 4, 1897, while made in the name of F. A. Hyde & Company, under powers, were in fact made in the interest of the plaintiffs the real owners, they having previously purchased the base lands from the said F. A. Hyde & Company and designated or named the lands to be selected (Record, p. 9). Further full notice of plaintiffs' claim in these lands under the selections named was given by record in the county (Record, p. 10).

The firm of F. A. Hyde & Company were large purchasers of lands surrendered to the United States as bases for lieu selections under the act of June 4, 1897, most, if not all of the lands surrendered by said firm having been acquired either directly or indirectly from the States of Oregon and California, being portions of the lands granted the said States in aid of common schools.

On November 21, 1902, an order was issued suspending all further proceedings upon selections made under the act

of June 4, 1897, with any of the so-called Hyde strip. This order has never been revoked, and it may be because of this order or because of the fact that the selection of March 3, 1902, had become a part of the record on the selection of March 29, 1900, said selection of March 3, 1902, has been entirely disregarded or overlooked by the Commissioner of the General Land Office, with the result that the defendants in this case were, long after the selections of 1900 and 1902, permitted to initiate and acquire, through purchase, the lands covered by these selections, including all of the lands the subject of this suit. All these proceedings with respect to subsequent disposition of the lands were without the knowledge or consent of the plaintiffs in this case, who only learned of the action of the Land Department respecting the disposition of the lands shortly before the institution of this suit (Record, p. 11).

When this case was first heard by the District Court that court overruled the demurrer, a copy of the court's opinion, dated April 10, 1913, will be found reported in Federal Reporter No. 205, at page 169. There was then pending before the Court of Appeals for the Ninth Circuit the case of Daniels *vs.* Wagner and fifteen other cases, in which the Court of Appeals, by its later decision of May 5, 1913, held:

> "That a selector of lieu land under the act of June 4, 1897, *supra*, acquires no vested right or equitable interest in the land selected merely by the filing of deeds of relinquishment and lieu selection papers in the local land office; but until the exchange and selection have been approved by the Commissioner of the General Land Office, such officer may reject the selection and award the land to a subsequent entryman" (205 Fed. Rep., 235).

It was because of this later opinion of the Circuit Court of Appeals that the case was further heard by the District Court, with the result that on November 10, 1913, an order was entered sustaining the demurrer and dismissing the bill.

The decree appealed from expressly follows the decision of the Circuit Court of Appeals in Daniels *vs.* Wanning, which case is now pending on appeal before this court, being case No. 256 of the present term.

The theory of the lower court in Daniels *vs.* Wanning, and the only theory that can sustain a decree against appellants in the present case, is that until actually and finally *approved for patent* a list land selection under the act of Congress of June 8, 1887, gives the selector no rights what ever which the Government or its officers is bound to respect; that although he has followed out explicitly the routine prescribed by the Government to enable one whose land the Government has directed to secure other land in exchange, although he has presumably, and as we allege in his complaint, undoubtedly, at great expense and pains, sought out other Government lands admirably open to selection and has selected them, relying in good faith on the offer made by the Government in the act of Congress, and relying also upon the doctrine that has been expressly upheld and enforced by the Government and by this court from time immemorial, viz: First in time, first in right, still, after all that, he has nothing.

In other words, if Government red tape delays the final approval of the papers, and if, meantime, some other man, taking advantage of the pioneer work of the first selector, should file on the list land as a homestead or a timber claim, or apply for its purchase under any other of the Government land laws, the above salutary principle which preserves the rights of those who are first in time, is to be disregarded and the last shall be first.

If the Government officers are—and the allegations in this case and the decisions of this court show that they sometimes are—careless and forgetful; if they forget or overlook, intentionally or by inadvertence, the selection made by the first applicant; if that selection is temporarily pigeon-holed, the work, time, and money of the pioneer

the exchange of property made by him in good faith under the sanction of a solemn law, the reputation of the Government for fair treatment to all applicants, goes for naught.

Such a theory upsets the whole basis and foundation of the faithful, disinterested and judicious administration of the Land Department. Every evil known to man is fostered and encouraged by this attitude of the Department.

The Question.

The sole question, therefore, for consideration in this case is, had the appellants acquired an interest in these lands through the proceedings taken under the invitation extended by the act of June 4, 1897, through the selections filed March 29, 1900, and March 3, 1902, in strict compliance with the regulations of the Land Department governing such selections, which the Land Department was obliged to respect, or in other words, had the Land Department jurisdiction to make disposition of these lands to others, notwithstanding the prior selections by the appellants under the act of June 4, 1897?

It is our contention, (*a*) that the selection of March 29, 1900, was in all respects a legal and valid selection and that its rejection was without authority of law, contrary to the established practice of the Land Department in similar cases, and as a consequence said selection was and is a legal appropriation of the land; (*b*) that the selection of March 3, 1902, was and is a valid and legal selection still pending undisposed of, and was and is a legal appropriation of the land, and (*c*) that by reason of these selections, the appellants have secured an equitable title in this land, and that the attempted disposition of the lands by the Land Department, at later dates, to the defendants, was without authority of law, a nullity and at most, constitutes but a cloud upon the title of the plaintiffs, and that defendants should be declared to hold such title as naked trustees to the use and benefit of the plaintiffs.

ARGUMENT.

First in Time, First in Right.

For over one hundred years the above sentiment has been the guiding principle, almost the fetich of the Land Department, and in the very few instances where some official has forgotten this principle this court has not hesitated to set him right very promptly and emphatically. What excuse is there now for overturning this splendid record of good faith? The Circuit Court of Appeals in the case of Daniels *vs.* Manning argues that because under the act of Congress the lieu land selections are to be forwarded to the Commissioner "for consideration and approval," therefore, until that approval is had, the Government is committed to nothing. But why? What necessity is there for thus singling out the lieu land selector and differentiating between him and claimants under every other public land law?

There is no reason why the Government should not and could not show good faith to the lieu land selector; no reason why his selections should not have exactly the same protection as any other inchoate interest in the public lands. If the selection is finally and properly canceled it is out of the way and the land open to other settlement or to such other selections as may have been filed and conditionally received subsequent and subject to the first selection; but if approved, the approval must be based on the circumstances and conditions as they existed *at the time the selection was filed.* The approval would not and could not be effectual—(in a country like ours where there is a great demand and usually more than one applicant for the same tract)—unless it was made effectual by the application of the doctrine of relation. All other *lieu land* selections, under railway, Indian, or other grants are "subject to approval," and we can see no reason why there should not be the same law and

protection for the selector of lieu land under the forest reserve act as for the selector of lieu land under the various railway and other grants, or for the homesteader or timber claimant or the selector under any other Government act. There is nothing in the act of Congress itself which calls for or justifies any such invidious distinction. Any one who for a numbers of years has dealt in public lands and has learned by his own personal experience with the Land Department, and by his reading of the decisions of this court the impartiality with which our Government attempts to treat all those with whom it has to do, finds it difficult to appreciate the distinction attempted in this case. Our argument against such distinction logically presents the following points:

I.

The Congressional Lieu Land Act of 1897, with the subsequent acts amendatory thereof, was an offer, and when accepted by reconveyance and selection in lieu thereof, in accordance with the terms and conditions set forth in that offer (and which are pleaded in this case and admitted by the demurrers) the exchange of lands as contemplated in that act became an **EXECUTED CONTRACT**, subject only to be set aside or become invalid upon certain conditions subsequent: as fraud, failure of title to the base land, conflicting and superior rights of third parties to the lieu land, etc.; but as between the selector and the rest of the world the exchange of lands was a completed transaction—the contract was closed.

II.

The reserved right of the Land Department to consider and approve selections offered in exchange under the Forest Lieu Act is not an arbitrary right and the selection can only be disapproved for substantial legal reasons, and such disapproval when given, is subject to review in a proper court.

III.

The failure of the official of the Land Department charged with the duty to give approval to a selection under the Forest Lieu Act, in all respects valid, is not conclusive upon the rights of the selector, and where, by mistake in the interpretation of the law or through oversight, approval of such a selection is withheld and patent caused to be issued to a subsequent claimant under the public land laws, the selector is entitled to maintain a suit in equity to have the patentee declared a trustee for his use and benefit.

I.

The Congressional Lieu Land Act of 1897, with the subsequent acts amendatory thereof, was an offer, and when accepted by reconveyance and selection in lieu thereof, in accordance with the terms and conditions set forth in that offer (and which are pleaded in this case and admitted by the demurrers) the exchange of lands as contemplated in that act became an EXECUTED CONTRACT, subject only to be set aside or become invalid upon certain conditions subsequent: as fraud, failure of title to the base land, conflicting and superior rights of third parties to the lieu land, etc.; but as between the selector and the rest of the world the exchange of lands was a completed transaction—the contract was closed.

Selection under act of 1897 based on conveyance of equivalent lands is in no sense a gratuity but a right bought at the Government price.

There can be no question but that if an individual landowner made such an offer as is contained in the Congressional act of 1897, and the owner of land referred to in such an offer accepted it and thereupon conveyed his land to the one who had made the offer, the transaction would be closed, in so far as the owner of the base land had actually acquired a right of selection in lieu of the land relinquished, and, under the authorities cited, if an individual landholder under such circumstances would have no right to arbitrarily refuse to approve of the lieu land selections when made, or to sell and convey the land selected to some other person, then the Government would have no such right.

The wording of the Congressional act is that the settler or owner of a tract within the limits of a public forest reser-

vation may, if he desires, relinquish and convey the land thus held or owned to the Government and select in lieu thereof other vacant and unappropriated public lands. The Government could not have appropriated private property within the boundaries of the forest without giving value therefor, and the Congressional act did not contain any reserved privilege in the Government of a right to refuse or accept the deed to the base lands at its pleasure. All that was necessary to complete the exchange of lands, so far at least as to obtain the right to select lieu lands, was, that the owner of the forest lands should convey the same to the Government and show a good title in the Government by certified copies of the records with abstract. The *consideration* paid by the Government was the right to select lieu lands, and that right of selection, on deed to the Government, was therefore property; as much so as so much gold. While that property right could be exercised only in certain ways, yet conceding a clear title to the base lands and due reconveyance of the same (which is alleged in the bill and admitted by the demurrers), the legitimate *purpose* and full intent of the regulations which required the lieu selection papers, evidencing the title to the base land, to be forwarded to the Commissioner for consideration and approval, and which thus required the lieu selection to be subject to certain delays before approval, was to allow the Government authorities a fair opportunity to see (*a*) that good title to the base land was secured, and (*b*) to see that only vacant and unappropriated public lands were selected in lieu thereof. *Surely the right to such a selection, based on conveyance of equivalent lands desired by the Government, is in no sense a gratuity but a right bought at the Government price.*

Ordinary Principles of Equity Applicable to Selection under Act of 1897.

As stated so clearly in the decision of this court in *U. S. vs. Detroit T. & L. Co.*, 200 U. S., 321, the actions of the Gov-

ernment in such matters must be subject to the application of ordinary principles of equity. Therefore the Government authorities could not lawfully refuse to approve appellants' lieu selections arbitrarily, nor for any reason whatever, except a good, valid, and sufficient reason within the contemplation of the Congressional Act of 1897, namely, either because of some failure of title to the base lands which had been surrendered, or because the lieu land selected had already been lawfully appropriated for other purposes.

As more fully elaborated in Point II, the Land Department could not arbitrarily or fraudulently or erroneously refuse approval of the selection. If they attempted any such inequitable or unlawful action, the courts of equity, upon proper application, would relieve against such errors and inequities.

It is evident, too, that the Government and the Land Department had this same understanding of the Congressional Act of 1897; because it was evidently with the idea of giving further definiteness to this right of selection and of securing its availability and adding to its marketable value that it was decided that such selections could be made by duly authorized attorneys in fact as well as in person. See the Secretary's instructions of March 6, 1900, 29 L. D., 580.

The bill alleges that, with the same object in view and because the Department recognized that the right of selection was a *property right,* the Land Department, after the passage of the Lieu Land Act, approved and acted upon selections made by the purchasers from the original owners of the base lands, and with the knowledge, consent and approval of the Land Department, the business of buying and selling these lieu land rights, or lieu land scrip as it was called, developed very extensively. There can be but one conclusion from what has been said thus far and that is that the right of selection, especially after the base land had been relinquished and assuming (as we allege and as is admitted by the demurrers) that the title to the base land was perfect

in the Government, was a something—an entity—a recognized piece of property that could be sold and transferred. That right came into existence as soon as the base land was relinquished, for after that it was merely a question as to *what* land would be selected—the right to select *some* land being complete.

The Government could of course amend the law and refuse all exchanges not carried into effect by relinquishment and selection of lieu lands, but until so amended the right of selection was complete on relinquishment or reconveyance, and when in March, 1900, and again in March, 1902, appellants had actually selected the lands involved in this suit, and when, as the admitted allegations show, the land so selected was at the time vacant and unappropriated public lands, appellants' right to the property selected became absolute and perfect; because, although the papers must pass to the Commissioner for consideration and approval, and although he would have been authorized to refuse approval if, upon such consideration, he had ascertained any defects of title in the base land, or that the land selected was subject to a prior appropriation or not of the character subject to selection, still under the allegations of the bill, which are admitted, there were no facts whatever to justify any such refusal of our selections.

To put it another way, we admit for the purpose of argument that until patent issued our right of property in the selected land was in danger of being lost and canceled by discovery of any facts that would prove that the lieu lands were in fact occupied and not available, or that the title to the base land was not good. But all possible objection to the title to our base land, or to our right to an approval of our selections, have been negatived by the allegations of the bill, which allegations are admitted by the demurrers.

The following cases make clear the rights of one who is a *bona fide* purchaser of a party claiming title to the property obtained from the Government, whether under deed,

patent or conditional selections or entries, or otherwise, because they hold that the rights of such purchasers must be governed according to the ordinary rules as would be applied as between individuals buying and selling property.

For instance, *United States vs. Clarke,* 200 U. S., 601:

> "A purchaser of timber from entrymen after final receipt is issued will be protected as a *bona fide* purchaser."

United States vs. Detroit, etc., 200 U. S., 321, at page 332:

> "We do not understand that one who enters into an ordinary contract for the purchase of property from another is bound to presume that the vendor is a wrongdoer, and that therefore he must make a searching inquiry as to the validity of his claim to the property."

In that case it was suggested that the purchaser of timber rights and property rights from the original entryman would not be protected as against fraud and improper transactions on the part of those from whom he purchased, but the court held that where the title offered was *apparently* good, that was sufficient to protect the *bona fide* purchaser, and he was not required to make a painstaking search for hidden flaws. He was only required to exercise reasonable prudence and diligence in determining whether the apparent title he was purchasing was valid.

To the same effect:

Jones vs. Simpson, 116 U. S., 609.
Wilson vs. Wall, 6 Wall., 83.
Townsend vs. Little, 109 U. S., 504.
United States vs. Winona, 165 U. S., 463.

Gertgens vs. O'Connor, 191 U. S., 237, at page 243:

> "The words '*bona fide* purchaser' in the act protecting *bona fide* purchasers from railway companies are not used in any technical sense, but simply as demanding good faith in the transaction."

Conveyance under act of 1897 *and selection in lieu constitute a contract and appropriate the land selected.*

Appellees in the lower courts have contended and will, we suppose, contend in this court, that because of the particular wording of the regulations under the lieu land act (viz., that the papers are to be forwarded to the Commissioner of the General Land Office *for his consideration and approval*), the rights of persons who select lands under that act are different from the rights of those who select lands under the public-land laws governing the making of a homestead, pre-emption, cash entry, timber entry or those who select land by the use of Sioux Half Breed, railway, or other scrip rights.

Respecting any such claim we say that the right of selection herein sought is, as we have shown, *not a gratuity*, but one based upon an especially valuable consideration. The private owner within the forest was not only injured by the inclusion of his land within the limits of the forest, but the Government, was desirous of acquiring title to the land held in private ownership within the limits of the forest.

In *Roughton vs. Knight* (219 U. S., 537), a right of selection under the act of 1897 was sought after the repeal of that act, predicated on a conveyance of privately held lands within the limits of a forest, but not perfected by formal selection of lieu lands before repeal of the law permitting the exchange. The right asserted was denied, but this court quoted with approval from the decision of the Secretary of the Interior reported in 34 L. D., 458, wherein it was said:

> "No contract arises until a selection is made, and the conveyance of the base tract filed in the Land Department. * * * Under the act of June 4, 1897, it is the filing of the deed in the local land office and the selection of the land in lieu of that relinquished which initiates the exchange. Until that time the exchange is not initiated and is merely a purpose in the private owner's mind."

The existence of a contract based upon a conveyance of the base lands accompanied by the selection of lands in lieu thereof is here clearly recognized, and the claim thus initiated is surely of as high a character as that initiated through formal application and original entry under the homestead law. With respect to the latter this court has repeatedly held that lands embraced in a homestead entry of record are severed from the mass of the public lands and appropriated from other disposition.

See *United States vs. Buchanan* (232 U. S., 72-76) and cases cited.

Under the admitted facts of this case the plaintiffs have done all that is required of them by the law or the reasonable regulations of the Land Department, and should be respected as the equitable owners of the land.

Cases Depended upon by Appellees Below.

Appellees will, of course, not contend against the general application of the principle "First in time, first in right," as a recognized principle in force in all matters relating to the disposition of public lands. But they will argue that for some reason that principle has no application to this lieu land act of 1897.

The appellees cited in the courts below, and will cite here as in support of their theory the following cases, and possibly others, namely:

United States vs. McClure, 174 Fed. Rep., 510.
Campbell vs. Weyerhaeuser, 161 Fed. Rep., 332.
Cosmos vs. Gray Eagle Company, 190 U. S., 301.

And of course the case of *Daniels vs. Manning,* the decision in which was rendered by the Court of Appeals just after Judge Cushman, of the Federal Court in the State of Washington, had decided the law issues of the present case in

favor of appellants, and it was, as before stated, in deference to the decision of the court of appeals in the case of Daniels *vs.* Manning, that Judge Cushman subsequently reversed himself and sustained the demurrer interposed by the appellees.

The cases relied upon by the appellees, however, do not sustain their position, except, of course, the case of Daniels *vs.* Manning.

In *United States vs. McClure* (174 Fed. Rep., 510), a suit to set aside a patent erroneously issued by the United States to certain lands, was resisted solely upon the ground that the lands in suit had been, prior to the institution of the suit, reconveyed to the United States as the basis for exchange under the forest lieu act of 1897, and in holding that this fact was no defense to the suit to cancel the patent it was, in effect, ruled that the execution and recording of a deed to base land under the act of 1897, vests no title in the Government; that until such deed and title are examined and approved it is a mere assertion by the applicant of his title and right to make a lieu selection; that such deed and tender amounts to nothing more than an offer of exchange, and that the title does not pass to either party until the offer is accepted and the change effected. Nothing was presented in that case which in anywise affects the issue herein.

In the case of *Campbell vs. Weyerhaeuser* (161 Fed. Rep., 332) and in the companion case of *Hoyt vs. Weyerhauser, Ib.*, 324, the Court of Appeals, because of an improper interpretation of the decision of this court in *Sjoli vs. Dreschel* (199 U. S., 564), held in effect that no rights were required under a pending indemnity railroad selection, prior to its approval by the Secretary of the Interior, as barred disposition of the lands to others under claims initiated subsequently to the filing of the indemnity selection.

These cases later came before this court, and in the Hoyt case, 219 U. S., 380, the decision of the Court of Appeals was reversed, and it is our contention that the ruling of this

court in that case is entirely in our favor and is unreliable of the issues in this case.

The congressional act under consideration in the Hoyt case gave to the Northern Pacific Railroad Company the right to select indemnity lands in lieu of lands included within the primary or place limits of the grant the title to which had failed because of the exceptions from the grant. Under that act, as under the lieu land act involved in this case, the original owners had lost certain lands—in the present case by the acts of Government in establishing forest reserves, and in the Hoyt case by the acts of third parties who had acquired rights in the granted lands prior to the time the railroad grant took effect. Under both acts the owners of the lands so lost were given the *right* to file lieu selections upon any unoccupied public lands. In the Hoyt case, at page 307, this court says with regard to the provision in the railroad grant which made indemnity selections thereunder *"subject to approval"*:

> "That it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of land lost within the place limits. * * * That a construction which would deprive a railroad company of its substantial right to select and would confer mandatory the exercise of the power of the Secretary of the Interior to approve lawful selections when made, would destroy the right which it was the purpose of Congress to confer."

Certainly that language applies with full force in the construction of the lieu land act of 1897, involved in the present suit, where there was *full title* in the individual to the base lands which was declared by the Government, and where there was no specific requirement for departmental approval of the lieu selection in the granting act.

In the Hoyt case this court shows that any other construction would be unjust and unreasonable, and that it

would be contrary to the spirit and letter of the law to say that, between the time the law attaches upon the filing of the railway company and the time of the Secretary's approval, third parties could enter upon the land as being still open to purchase or entry. As to that point the court uses the following language:

> "The requirement of approval by the secretary consequently imposed on the officials the duty of determining whether selections were lawful at the time they were made, which is sometimes only by inquiry that can not be completed for several years, and pending action of the secretary. The scope of the power to approve lieu of selections conferred on the secretary has clearly existed ever since *Wisconsin C. R. Co. vs. Price County*, 133 U. S. 496, came to be and that the power to approve has existed ever since it was said that the power to approve any selection is by nunc. Assuming that attitude the authority therefore involved not only the power, but required the duty, in determining the particulars of the situation as of the time when the position of the railroad company was located by the filing of the list of selections."

The court has proceeded to show that in accordance with these principles the Land Department and the courts have for an entire year sustained the Section of station, which Section would have no value whatever except on the theory that after a party has made a selection of land under act of Congress the right so secured, if properly followed up, will be paramount to the rights of any other person subsequently acquired.

It is true that in the Town and the title finally completed was the title that had been actually conveyed to settlers in the original sections. The decision of the District court had been to the effect that that patent should have been issued to Hunt instead of to the railway company as Trust, however was claiming under the railway company. As the patent was plaintiffs had fully complied with the law and

regulations before the wrongful issuance of patent to the appellees, and the reasoning of the court applies to our position as fully as if *we* were the patentees and the Grays *et al.*, appellants, were suing to set aside *our* patent for some alleged invalidity. In the Hoyt case this court again definitely established and confirmed the principle that one who is "first in time is first in right," and that the granting of certain powers to the Land Department among others the right to consider and approve lieu land selections, does not vest the Department with authority to digress from or disregard this old principle, and on page 388 the court cites a large number of decisions which have from the organization of this court down to date expressly and forceably confirmed that same principle that "first in time in the Land Department is first in right," commencing with *Gibson vs. Chouteau,* 13 Wall., 92, and ending with *United States vs. Detroit Lumber Company,* 200 U. S., 321.

On page 384 of the opinion this court in discussing the alleged basis given by the Circuit Court of Appeals for its decision in the Hoyt case, and necessarily the basis for their decision in the case of Campbell *vs.* Weyerhaeuser relied on by the appellees, states that the Circuit Court of Appeals in attempting to justify its decision, did not indicate that it was the result of an original interpretation of the Congressional act, but that their decision was expressly based upon what the Federal court judges thought this court had decided in the case of *Sjoli vs. Dreschel, supra,* and after a review at great length of all of the decisions of this court upon similar issues it is found that the Federal court judges had not correctly interpreted the decision in the Sjoli case.

That case is distinguished as one of those cases in which the court was considering only what acts were adequate to initiate a right to land that would be superior to a list of lieu selections when such acts were done *before* the filing of such lists. Whereas in the Hoyt case the acts under which Hoyt claimed all occurred *after* the railroad had filed its lists

of selections, just as in this case the rights of appellees were all initiated *after* appellants had filed their selections.

On page 394 of the opinion this court further says that while the general language used in the Sjoli case might be contradictory of the court's decision, that fact presented no serious difficulty, and argues against its duty to follow that general language as precedent and controlling authority for this reason, that the result could not be accomplished without a violation of the fundamental rule announced in *Cohens vs. Virginia*, 6 Wheaton, 264, so often since reiterated and expounded by this court to the effect that:

> "General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The wisdom of the rule finds an illustration here when it is considered that not even an intimation was conveyed in the Sjoli case of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval by the Secretary of the Interior of a lawful list of selections."

It is also true that in the case of *Weyerhaeuser vs. Hoyt* the list of selections finally sustained had been actually approved by the Secretary of the Interior, and that in the present case there has been no such approval by any official in the Land Department. That, however, does not weaken our position. If the principle be admitted to govern here, which was so emphatically reaffirmed by this court in the Hoyt case, namely, that the duty of the Secretary of the Interior to approve or disapprove of selections made under lieu land acts which must be expressly reported to him for consideration and approval, must be determined according to the conditions existing *at the time when those selections were made*, and if it also be admitted that parties who are injured by the failure or inadvertence of the Land Department officials to

exercise their duty according to that principle, can have their rights established and their wrongs redressed upon proper application to the civil courts, and that the courts have a right of review of the Land Department officials' decisions and actions for that purpose, certainly the demurrers in this case must be overruled, otherwise one measure would be made for one person and an entirely different measure be made for another person, merely because the Government officials had failed in the one case to perform in a lawful manner a particular duty expressly imposed upon them, and in the other case they had performed it; although in both cases it must be admitted on the facts alleged in the complaint, and which are, of course, admitted by the demurrers, that the action of the Land Department official, had he not inadvertently overlooked the necessity to act in the present case, must have been and would have been the same.

That the decision of this court in the Hoyt case is controlling of the present case is further shown by the dissenting opinion of two of the justices, wherein is pointed out the full scope and effect of said decision. To the same effect is the decision of this court in the case of Rasmus K. Svor *vs.* Catherine M. Morris, 227 U. S., 524.

This brings us to a consideration of the decision of this court in Cosmos Company *vs.* Gray Eagle Company, 190 U. S., 301, and we admit that the general language used in that decision is in favor of the position of the Circuit Court of Appeals in its decisions in Daniels *vs.* Manning and in the present case. We submit, however, that the precise point at issue and decided in the Cosmos case does not militate against our position here; but, on the contrary, supports it, and that the general language used in the Cosmos case cannot be considered final and conclusive authority to determine the points at issue in this case, under the principle announced by this court in the Hoyt case, where, beginning on page 394, this court says that, although the general language of the Sjoli case was contrary to the holding in the Hoyt case, that the fact presented

no serious difficulty, for the reason that the fundamental rule announced in *Cohen vs. Virginia, supra,* and so often since reiterated and expounded by the court, was controlling, namely:

> "General expressions in every opinion are to be taken in connection with the case in which those expressions are used, and if they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

In Cosmos case it appeared that the issues between the rival claimants were *still pending* before the Land Department. No decision as to their relative merits had at that time been made by the Land Department. The court accordingly held that under those circumstances the jurisdiction of the Land Department was exclusive because the civil courts could not be appealed to until *after* the Land Department had made its decision. On pages 314-315 this court says:

> "What *may* be the decision of the Land Department upon these questions (whether the selected land was non-mineral, etc.), cannot be known, but until the various questions of law and fact have been determined by that department in favor of complainants, it cannot be said that it has a complete equitable title to the land selected."

By inference the court clearly suggests that when the Land Department has acted in a particular case, then the civil courts may be appealed to, upon their equity side, to redress any wrong caused by any obvious error or mistake on the part of the Land Department officials, in accordance with a long line of authorities, many of which are cited under point three.

The general language used by the court in Cosmos case, when construing and interpreting this Lieu Land Act of 1897, should be respected, of course, but it is not controlling,

because the precise point as to just what rights were or might be acquired by the lieu land selector was not before the court. The entire discussion as to the meaning of the Lieu Land Act was purely abiter as the case turned upon the point that the Land Department had not at that time lost jurisdiction of the matters at issue. The rival claimants were still before the Land Department. In the present case, however, the Land Department has by the issuance of patents lost its jurisdiction. The rights between the appellants and appellees are not pending before the Land Department and cannot be fought out in that jurisdiction. They can only be presented to civil courts.

In the *Cosmos* case as quoted this court says:

> "The lieu land selector could not be said to have a complete equitable title *until* the Department had determined the various questions of law and fact in his favor."

The court would make the same response and holding in the present case if, as a matter of fact, the Land Department still had the title to the property and had not lost jurisdiction. But the language of the Supreme Court by inference clearly shows that when the Department has acted the rival claimants have a right to go to a court of equity and have the decision of the Land Department reviewed and corrected in the event of obvious error and mistake. Certainly (as was said by the court in the decision quoted from Weyerhaeuser *vs.* Hoyt on page 394) there was no intimation in the Cosmos case and no intention on the part of this court to overrule the long line of its decisions holding that in land matters "first in time is first in right," and that the decisions of the Land Department are subject to review in the civil courts, and that in a proper case showing the issuance of patents by mistake or error or inadvertence on the part of the land officials the rights of the innocent parties will be protected and their wrongs redressed.

There was no intimation, we say, in the Cosmos case that this court intended to set aside those salutary principles. It is evident that the court was not considering the proper construction of the Lieu Land Act of 1897, in view of those well-recognized principles, and for the very reason that, as we argued before, the language of the court on this subject was not called for by the precise point at issue, and the respective merits of the parties to that suit were not settled by the court by that decision, and were not intended to be settled.

The real scope of the decision is also very clearly set forth on page 313, near the bottom in the following language:

> "It is certain, as we have already remarked, there must be some decision upon that question whether the terms of the act have been properly complied with before any equitable title can be claimed * * * some decision by an officer authorized to make it. Under the rule above stated (rule 18, which refers to the decision of the commissioner) that decision has not been made."

Judge Cushman, who heard the present case in the Circuit Court for the Ninth Circuit, originally decided in favor of the bill and overruled the demurrers, and later, after decision had been rendered in the Circuit Court of Appeals in Daniels *vs.* Manning, on a motion to reopen the case because of that decision of his superior court, Judge Cushman practically reversed himself and filed a decree sustaining the demurrers. However, Judge Cushman's original decree in favor of the bill is so well and forcibly worded that we will quote the latter portion thereof as a part of our brief in this case, being that portion of the decision which construes this lieu land act of 1897, and which carefully reviews the decision of this court in the Cosmos case. Judge Cushman in his opinion had reviewed and quoted extensively from the McClure and Hoyt decisions by the Circuit Court of Appeals and from the decision of this court in

Weyerhaeuser *vs.* Hoyt and he held that the decision in this latter case not only overruled the decisions in the Circuit Court of Appeals in the McClure and Hoyt cases, but that it was conclusive of the matters at issue in the present case. He then reviewed the Cosmos case and took the same position with reference to it that we are now contending for, namely; that it was not in point, that the scope of the decision must be confined, according to the fundamental doctrines and decisions of this court already quoted, to the particular points at issue, namely, that while the interests of the rival claimants were still pending before the Department, neither of them could go into a court of equity and attempt to secure any relief as against the other, and he then proceeds to reason as follows:

> "In Campbell *vs.* Weyerhaeuser, 161 Fed., 332; 88 C. C. A., 412, the same court rendering the decision as in Hoyt *vs.* Weyerhaeuser, it was decided, where a person repeatedly filed under the timber and stone acts, his application to enter the land, but the officers of the Land Department rejected his application each time, and refused to permit him to enter the land, subsequently patenting it to another, that the former had not thereby placed himself in privity with the United States in title, before a patent issued to another, and may not maintain a bill in equity to charge the title under the patent with a trust in his favor.
>
> "The Supreme Court, in affirming this decision, declined to place the affirmance on the ground upon which it was decided in the Court of Appeals:
>
> " 'The Court of Appeals held that Campbell acquired no equitable interest in the land by his application, and the denial thereof, and consequently he could not maintain a bill in equity to charge the title under the patent issued to the railroad company upon a selection of a tract as lieu land, and affirmed the decree of the Circuit Court dismissing the bill. As in any event the decision rendered in the Hoyt case is decisive of this, we hold that the bill was rightly dismissed, and the decree of the Circuit Court of Ap-

peals is therefore affirmed.' 219 U. S., 425; 31 Sup. Ct., 321; 55 L. Ed., 279.

"The extracts which have been given from the opinion in the Weyerhaeuser *vs.* Hoyt show that the Supreme Court's ruling was based upon two grounds—the broad ground that Congress intended to confer a substantial right upon the railway in giving it this right to make lieu land selection, which would be defeated if it were held that a selection, in all things regular, created no interest in the land. The court reached the same conclusion on the further ground that even a narrow construction of the act showed the same reason and intent, because the means provided to be employed—that is, the requirement of the approval of the Secretary of the Interior to determine whether the selected lands included those in which the rights of others had attached prior to selection—would be useless if no right attached upon selection.

"The right to lieu land selections on account of land individually owned and included in a forest reserve is a substantial right. It cannot be but that Congress intended to confer a substantial and valuable advantage upon the landholder in forest reserves. It was to the advantage of the United States to get the settlers out of the reserves, that the danger from fires, and perhaps other sources might be lessened, and the care for and development of the reservations to the best advantage attained. At the same time, Congress could not but realize, in surrounding the land of the individual with a reservation, thereby isolating the settler and his land, separating it and him from all possible proximity to commercial and social development, markets, schools, churches, and many other things that man with his social instincts, requires and values, that thereby substantial advantages to the individual landholder had been cut off. By the Lieu Land Act it was intended to, at least in part, restore these advantages of which he had been deprived by the creation of the forest reserve.

"It is true, that in the case of the railway, it had lost entirely the base land in the place limits for which it made its selection in the indemnity limits. In the forest reserve, the individual retains the title

until the exchange with the Government is completed; but all the substantial advantages he had a right to build upon in acquiring it are lost by the including of his land in the Government forest. That which is left is but a shadow. True, it enables him to forbid others entering upon his land, but that is about all.

"The second ground of the Supreme Court's ruling is also found in this case. The act of June 4, 1897, provides:

" 'The applicant "may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such a case for making the entry of record or issuing the patent to cover the tract selected." 7 Fed. St. Ann., 318.'

"Rule 18 promulgated by the Interior Department under this act, 24 Land Dec. Dep. Int., 589, at 593, provides:

" '18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with a report as to the status of the tract applied for.'

"The courts will take judicial notice of department rules. Caha *vs.* U. S., 152 U. S., 211, 221; 14 Sup. Ct., 513; 38 L. Ed. 415; Cosmos Co. *vs.* Gray Eagle Co., 190 U. S., 301, 309; 23 Sup. Ct. 692; 47 L. Ed., 1064.

"Of what benefit or effect could be the consideration of the Commissioner of the General Land Office of the status of the land applied for, whether vacant or open to settlement at the time of selection, or not, if the selection itself vests in the applicant no substantial right or equitable interest? If it does not do so, the mere report of the status of the tract at the time the local officer made his report would be no guide for any purpose. It would be a vain thing.

"Whether after having suspended entries under the Hyde script, without determination of its validity, the action of the Department of the Interior is considered as an intentional disregard of the Hyde & Co., filing, or that it was overlooked and forgotten by the

officers of that Department, directly charged to be the fact in the bill—that is, whether viewed as a mistake of law or fact—the allegations of the bill are sufficient. Germania Iron Co. *vs.* U. S., 165 U. S., 379, at 385; 17 Sup. Ct., 337; 41 L. Ed., 754.

"Defendants contend that the bills show that complainants have been guilty of laches in not compelling the Interior Department to vacate the order suspending entries on the Hyde script, and, further, compelling that Department to act upon complainants' selections prior to the issuance of patent to the defendants and their grantors. The question of laches is affected and qualified to such an extent by the surrounding circumstances that it will not be presumed, and the complainants forced to negative it, unless a clear case is presented."

II.

The reserved right of the Land Department to consider and approve selections offered in exchange under the Forest Lieu Act is not an arbitrary right and the selection can only be disapproved for substantial legal reasons, and such disapproval when given, is subject to review in a proper court.

That the reserved right of approval is not arbitrary, but, on the contrary, is judicial, has been repeatedly ruled by this court.

In *Wisconsin Central Railroad Company vs. Price County* (133 U. S., 496, 511), it was said, in referring to the matter of approval to be given a list of railroad indemnity selections, "his action in that matter was not ministerial, but judicial."

This was reaffirmed in *Weyerhæuser vs. Hoyt, supra,* wherein it was said, at page 388 of the opinion:

"The scope of the power to approve lists of selections conferred on the Secretary was clearly pointed out in *Wisconsin Central Railway Company vs. Price*

County, 133 U. S., 496, 511, where it was said that the power of approval was judicial in its nature. Possessing that attitude the authority therefore involved not only the power but implied the duty to determine the lawfulness of the selection as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections."

In *Garfield vs. Goldsby* (211 U. S., 249, 262) it was said:

> "But, as has been affirmed by the court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

In *Wisconsin Central Railroad Company vs. Forsyth* (159 U. S., 46) it was urged that the question of title had been determined in the Land Department adversely to the claim of the plaintiff, and in disposing of this contention this court said (p. 61):

> "This is doubtless true, but it was so determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by a decision of the Land Department.
>
> *Johnson vs. Towsley*, 13 Wall., 72.
> *Shepherd vs. Cowan*, 91 U. S., 330.
> *Quinby vs. Conlan*, 104 U. S., 420.
> *Doolan vs. Carr*, 125 U. S., 618, 624.
> *Lake Superior Ship Canal, etc., Co. vs. Cunningham*, 155 U. S., 354."

These cases, and many more of like import, clearly establish the principle that the legal effect of the decisions or the actions taken by the officers of the Land Department, in the disposal of the public lands, are not binding upon, nor do they conclude the action of the courts, in respect to proceed-

ings arising after the issuance of the patent of the United States to the land involved.

The adverse decision of the Land Department upon plaintiff's selection of March 29, 1900, being erroneous in law is subject to review in these proceedings, as well as the palpable error of that department in overlooking or disregarding plaintiff's second selection of March 3, 1902, and patenting of the land under purchases made long subsequent to said selections.

Selection of March 29, 1900.

The bill alleges that the selection of March 29, 1900, was in strict compliance with the rules and regulations of the Interior Department, governing such selections. Said selection was based upon a previous conveyance of a like amount of land to the Government, situate within an existing forest, and was accompanied by an abstract showing full title in the United States in the lands thus conveyed. The proof filed with the selection not only showed the selected land to be of the character subject thereto, but the subsequent patenting of the lands, under the purchases erroneously allowed by the defendants, is in further substantiation thereof.

Prior to the filing of this selection, the State of Washington had secured a preferential right of selection in the lands of the entire township, but in the exercise of its right it did not include in its selection the lands the subject of this suit, so that the most that can be said with regard to said claim of the State, as affecting this land at the time plaintiff's selection of March 29, 1900, was filed, was that it was burdened with the right of selection pre-existing in the State of Washington, but which, as before said, was not within the prescribed period, or at any other time, exercised by the State, so far as the land in question is concerned. Because of this preferential right of the State, *and for that reason alone,*

plaintiff's selection of March 29, 1909, was by the Land Department held invalid, and approval thereof refused.

It is our contention that this action was not justified, and further that it is contrary to the repeated rulings of the Land Department made in other cases.

It was not infrequent after any one of the States named in the act of 1894 had applied for the survey of a number of townships, as the State was free to select such parts only as it desired, it often happened that on the filing of the plat of survey of any given township selections were made in behalf of the State of only a very small portion thereof. The preferential right of selection in the State under this act, is very similar to that gained where a contestant of an entry of record pays the land office fee, and secures its cancellation. To such a person the act of May 14, 1880 (21 Stats., 140), grants a preference right of entry to the land contained in the cancelled entry for a period of thirty days from the date of notice of such cancellation, and it has been uniformly ruled by the Land Department that an application to enter land embraced in the cancelled entry may be allowed during the period accorded for the exercise of the preference right of a successful contestant, subject, however, to the exercise of such preferential right.

Stanley vs. Brown, 1 L. D., 115.
Nixon Phillips, 3 L. D., 555.
Cleveland vs. Inman, 6 L. D., 559.
Kinney vs. Lee, 6 L. D., 662.
George Preuss, 9 L. D., 70.
Henry Cooper, 10 L. D., 221.
Rogers vs. Dyer, 25 L. D., 397.
Kipp vs. Wood, 25 L. D., 571.
Fuller W. Curtis, 30 L. D., 406.
McGuire vs. Woody, 37 L. D., 146.

How the adverse decision upon plaintiff's selection of March 29, 1909, came to be rendered does not appear, for

the Land Department has, by repeated decisions, recognized and allowed rights initiated by possession of lands after an application by a State for survey, and prior to expiration of the term of preferred right of selection to the State.

In the case of the State of Idaho vs. Northern Pacific Railway Company ([illegible] L. D., [illegible]), it was said:

> "It is contended that the company was not entitled to select under the act of March 2, 1899, supra, * * * lands for the survey of which application was made by the State. The contention that the lands were not subject to selection by the company because subsequent to the State's application for survey, was it still taken, would not be [illegible] as to the lands [illegible] for by [illegible]. * * * As to [illegible], the objection, if valid, would only be material in so far as it affected title from the [illegible] of [illegible] the prior settlement. The application of the State for survey did not, however, operate as an absolute withdrawal of the lands described therein, but only protected such lands to the preferred right of the State to select them within sixty days from the date of the filing of the approved plat of survey."

Again in Simmons vs. Northern Pacific Railway Company, [illegible] L. D. [illegible], the precise point here in issue was squarely decided. In that case the railway company selected the land at a date subsequent to the State's application for survey. After selection by the company, but prior to survey, Simmons settled on the land claiming it under the homestead law, and on his behalf it was asserted that the application for survey made by the State under the act of [illegible] operated to withdraw or reserve the land, so as to prevent selection thereof by the railway company, and as Simmons was a settler on the land at the time of survey and at the time when the State's preference right expired, his entry should have been allowed unless the railway company's selection was held valid from its inception. But the Department held that the company was entitled to the land, saying:

"It is contended further that the application of the State of Idaho for a survey of the township of which the tracts applied for are a part, made prior to the selection by the railway company, operated to reserve the land from other disposition until after the expiration of three months from the filing of the approved plat of survey, and as his settlement was made and his homestead application presented prior to the expiration of said period, his entry should have been allowed. *The effect of the application of the State was not, however, to place the land in reservation, but only to secure the State a preferred right to select the lands covered by its application. It did not operate to prevent the filing of other applications for the land subject to the superior right of the State. In this case the State made no attempt to exercise its preferred right of selection, and there was therefore no bar to the consideration of other claims the same as though such right had never existed.*"

Again, in the case of the *Heirs of Irwin vs. State of Idaho,* 38 L. D., 219, it was said:

"In disposing of the State's claim it is sufficient to say that the question presented, or questions entirely similar, have been repeatedly determined by this Department and the courts. *The preference right awarded the State by the act of 1894 seems to be in no way superior to the preference right awarded to the successful contestant by the act May 14, 1880, supra * * * The act of 1894 merely gives the State a preference right of selection over all other applicants, and in thus inviting the State to apply for the survey of lands whereby a preference right over others may be secured the Government in no way commits itself or agrees to withhold the lands from any disposition which it may find necessary to make of the same.*"

These references may be greatly multiplied, but they seem sufficient from which to establish a practice under which the plaintiffs' selection made March 29, 1900, should

have been respected as a valid selection, at least from date of expiration of the State's preferred right without selection of this land.

In this connection permit us to say, that the adverse ruling made on plaintiffs' said selection was not for the protection of any rights in the State, and if approved by this court, it opens the door to the possible practice which might encourage applications in the name of the State for improper purposes, such as waiver of the State's preference for a consideration.

Selection of March 3, 1902.

The selection of March 3, 1902, was and is a legal appropriation of the land, and is still pending before the Land Department undisposed of. The bill alleges that this selection was made in strict conformity with the rules and at a time when there was no possible claim under the State's application for survey. The only possible excuse for disregarding this selection was because it was made in the name of F. A. Hyde & Co., and that shortly after the selection was made, an order was issued by the Land Department suspending all selections made on what is known as Hyde scrip. That it was a valid selection and is still pending is admitted by the pleadings, and this fact alone would support a suit by the United States to cancel and annul the patents issued to the defendants under their purchases made long subsequent to said selection.

Germania Iron Company vs. United States, 165 U. S., 379.

III.

The failure of the official of the Land Department charged with the duty to give approval to a selection under the Forest Lieu Act, in all respects valid, is not conclusive upon the rights of the selector, and where, by mistake in the interpretation of the law or through oversight, approval of such a selection is withheld and patent caused to be issued to a subsequent claimant under the public land laws, the selector is entitled to maintain a suit in equity to have the patentee declared a trustee for his use and benefit.

We realize that generally some one must act for the United States in the matter of exchanges proposed by the Government in the forest lieu act of 1897, and that the officer to represent the United States in such matter is the supervising head of the Land Department charged with the administration of the public land laws. In this case that official has totally failed to either approve or disapprove plaintiffs' selection of March 3, 1902, and has, by issuing patents to others for the lands selected, removed it beyond his jurisdiction to now pass upon this selection, but surely the failure of that official to perform his duty cannot destroy plaintiffs' rights, and it is our contention that the court should, under the authorities, recognize the validity of plaintiffs' right and protect them by holding that the appellees are trustees of the legal title in their behalf.

In *Railroad Company vs. Smith* (9 Wall., 95), there were conflicting claims under a grant made in aid of the construction of a railroad, and one made to the State of all the swamp and overflowed lands. Smith claimed under the latter grant. The swamp-land grant made it the duty of the Secretary of the Interior to make out accurate lists of the swamp and overflowed lands granted the several States. The act provided that, in making out such lists, whenever the

greater part of the subdivision is wet and unfit for cultivation, the whole tract shall be included in the list, and *vice versa*. Thus, there was not only an ordinary discretion reposing in the Secretary of the Interior, under the swamp-land grant, but there must have been, preliminary to listing lands to the State as swamp lands, a *quasi* judicial ascertainment as to the character of the land under the rule prescribed in the granting act. It was admitted that the land had never been listed by the Secretary of the Interior under the swamp-land grant. Nevertheless, in affirming the judgment below in favor of Smith, it was said by this court, pages 99 and 100 of the opinion:

> "By the second section of the act of 1850 it was made the duty of the Secretary of the Interior to ascertain this fact, and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the Land Department with the State officers, he must, if he had attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant under which plaintiff claims, a grant which was also a gratuity?
>
> "The matter to be shown is one of observation and examination, and whether arising before the Secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the Sec-

> retary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.
>
> "Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the States, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant."

True, in that case Smith was not asserting his title by a direct action in the courts, but, we submit, the plaintiff's case here is much stronger in this, that not only has the Secretary of the Interior failed to do his duty with respect to the plaintiff's selections, but, by the issuance of patents to others, he has removed the land involved from his jurisdiction, so that he cannot now do what he should have done, and plaintiff's remedy is only in the courts.

It has many times been announced by this court that where public-land officials make application of an erroneous principle of law or adopt an erroneous construction of a statute in determining rights of claimants to public lands, a court of equity may be resorted to after the issuance of the Government patent for the land, to right the wrong and protect the rightful claimant. In Lee *vs.* Johnson, 116 U. S., 48-49, this court said:

> "If, however, those officers mistake the law applicable to the facts or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed."

That the failure of the Land Department to give approval to a lieu selection does not bar a suit to charge the land erroneously patented with a trust, is clearly recognized in the

recent decision of this court in the case of Great Northern Railway Co. *vs.* Hower *et al.*, decided March 22, 1915. In that case a suit was brought on a selection made of land while yet unsurveyed, by the St. Paul, Minneapolis & Manitoba Railway Company under the act of August 5, 1892, 27 Stats., 390, under which selection the Great Northern Railway Company based its claim. The selection was canceled by the Land Department because of an alleged prior claim to the land selected in a settler under the homestead laws. The settler prevailed in the Land Department, and received the patent of the United States, whereupon the Great Northern Company brought suit to charge the title thus given in trust to its benefit.

On finding that the settler's alleged claim was without foundation, this court held:

> "Under these circumstances we are constrained to the conclusion that the complaint, upon its face, made a case entitling the plaintiff in error to the relief sought."

Here is the very latest expression of this court, favorable to plaintiffs' suit, and we submit the case with confidence that this court will hold, upon the record, that the plaintiffs are entitled to the relief sought.

Respectfully submitted,

ALEXANDER BRITTON,
EVANS BROWNE,
FRANCIS W. CLEMENTS,
Attorneys for Appellants.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, May 23, 1902.

NORTHERN PACIFIC RY. CO., SIMPSON LOGGING CO., and F. A. HYDE AND COMPANY
vs.
STATE OF WASHINGTON.

The Commissioner of the General Land Office.

SIR: This case is before the Department upon the several appeals of the Northern Pacific Railway Company, the Simpson Logging Company, and F. A. Hyde and Company, from your office decision of December 21, 1901 holding for cancellation the Northern Pacific Railway Company's list No. 90 and supplemental list No. 90, and holding for cancellation the respective lieu selections No. 2900 of the Simpson Logging Company and No. 3029 of F. A. Hyde and Company, for certain lands in township 11 north, range 4 east, Vancouver land district, Washington.

The records of your office show that the State, on January 5, 1899, applied for a survey and reservation of this township in accordance with the provisions of the act of August 18, 1894 (28 Stat., 394); that this application was received in your office January 17, 1899, and that thereupon your office, January 25, 1899, notified the local officers that the lands within said township were reserved "from further adverse appropriation" from date of the receipt of the State's said application for sixty days after the filing of the plat of survey in the district land office. The decision appealed from states, and it is not denied by the appellants, that a notice of the State's said application was duly published as required by said act.

It appears from the papers accompanying the appeal that the township was surveyed and the plat of survey was filed in the local office at Vancouver, April 10, 1901. Prior to this time, however, and on November 9, 1899, which was after the State's said application for survey, after it was received at your office, and after your office had directed a withdrawal of the lands, the Northern Pacific Railway Company filed in the local office its list of selections, numbered 90, of lands in said township, under the provisions of the act of March 2, 1899 (30 Stat., 993), which was rejected by the local officers because of said withdrawal; whereupon the State appealed to your office. While this appeal was pending, and on April 10, 1901, being the same day the township plat of survey was filed, said company filed a new list of selections No. 90 of the same lands, "describing anew" the lands selected "so as to conform with the United States survey thereof.

It further appears that on August 10, 1900, and September 10, 1900, the Simpson Logging Company and F. A. Hyde and Company, respectively, proffered under the act of June 4, 1897 (30 Stat., 11, 36), selections of lands in said township in lieu of lands surrendered by them in the Olympia and Pine Mountain and Zaca Lake forest reserves.

June 6, 1901, which was within the period of sixty days after the filing of the township plat of survey, and, therefore, while the lands were in reservation, as aforesaid, for the use of the State, the State filed its lists of selections No. 18, as indemnity for lost and deficient school sections. This list was rejected by the local officers, June 8, 1901, because of the said proffered lieu selections under the act of June 4, 1897, *supra,* and because of the railway company's proffered selections per list No. 90 under act of March 2, 1899, *supra,* and the State appealed to your office.

The case, as it stands before the Department, does not involve the validity of the State's claim. For the purposes of the case as presented by these appeals, it is enough to say that

the lands being withdrawn at the date of their attempted selection by the appellants no right was thereby initiated. That withdrawal was made in pursuance of specific legislative authority, and during the period of the reservation thereby made the land was not subject to any appropriation adverse to the purpose for which it was withdrawn. Wolsey *vs.* Chapman (101 U. S., 755); Wood *vs.* Beach (156 U. S., 548); Spencer McDougal (159 U. S., 62); Riley *vs.* Wells (Book 19, Lawyers' Co-operative Edition of United States Supreme Court Reports, 648); Hans Oleson (28 L. D., 25); Allen H. Cox, on re-review (31 L. D., 193).

The decision appealed from is affirmed.

Since this case was appealed to the Department the Simpson Logging Company and F. A. Hyde and Company have filed certain supplemental applications in the matter of their said lieu selections. These are herewith transmitted, with all the papers in the case, for the consideration of your office.

Very respectfully,

(Signed) E. A. HITCHCOCK,
Secretary.

28201)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 632

W. H. SAWYER AND FRANCES SAWYER, HIS WIFE, AND ALFRED C. TUXBURY AND LENA B. TUXBURY, HIS WIFE,

Appellants,

vs.

RAYMOND S. GRAY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR CERTAIN APPELLEES.

F. M. DUDLEY,
H. H. FIELD,
Solicitors for Milwaukee Land Company, Appellee.
MOULTON & SCHWARTZ,
Solicitors for Charles S. Forbes, et ux Frank L. Huston and John H. Patten, et ux, Appellees.

BUCKLEY-BARKER PRINTING COMPANY, CHICAGO.

INDEX.

CITATIONS.

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Appellants,

vs.

RAYMOND S. GRAY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF FACTS.

Appellees, on April 6th, received from the clerk a notice that this case had been advanced for hearing following the Daniels cases Nos. 234 and 248 inclusive, and that those cases would probably be reached for hearing during the week beginning April 12th. No notice of a motion to advance this case was served upon these appellees and no briefs on behalf of the appellants have been served. This condition necessitates a statement of the facts.

The District Court for the Western District of Washington, Southern Division, entered a decree of dismissal

in favor of the defendants below (appellees here), upon sustaining a general demurrer to the third amended bill of complaint. (Tr., 16-17.) Complainants having appealed, the decree of the District Court was affirmed by the United States Circuit Court of Appeals (Tr., 28-29) (213 Fed., 1022; 129 C. C. A., 666), and the present appeal is from that affirmance. The question presented is, therefore, whether the facts set forth in the third amended bill, entitle appellants to relief.

Appellants claim that the United States has issued to the appellees and their grantors, patents for public lands which should have been patented to appellants, and pray that appellees be declared trustees holding such lands in trust for appellants, and that they be required to convey to appellants the titles so held.

The essential facts set forth in the third amended bill of complaint are as follows:

That on January 25, 1899, the State of Washington, under the Act of Congress of August 18, 1894, requested the Commissioner of Public Lands to cause the lands in township 11 north, of range 4, E. W. M., in the State of Washington, together with other lands, to be surveyed; that such survey was made and the township plat filed in the United States District Land Office at Vancouver, Washington, April 10, 1901; that pursuant to the provisions of the Act of Congress of August 18, 1894, the state was allowed sixty days after the filing of the plat of survey, to wit, until June 9, 1901, within which to select from the unappropriated lands in the township such portions thereof as it desired, by filing a list of its selections in the Land Office; that the survey included the lands in controversy, but that the state did not include such lands in its list of selections, filed June 6, 1901.

Appellants claim an equitable interest in the lands in controversy sufficient to entitle them to maintain this action by virtue of two attempted selections under the provisions of the act of Congress approved June 4, 1897 (30 Stat. at L., 34, 36), the first made March 29, 1900, before the survey of such selected lands, and the other made March 3, 1902, after such survey. The patents under which appellees assert title were issued on the following dates, namely:

A patent for the W. 1/2 of S. E. 1/4 and the S. E. 1/4 of S. W. 1/4 of section 32, township 11 north, range 4 East, W. M., Washington, issued to appellee, Raymond S. Gray, May 1, 1906.

(This date is given in paragraph 7 of the bill, as printed on page 11 of the transcript, as May 1, 1908; that the date as printed is erroneous appears not only from the bill itself, as filed, but also from the allegation contained in the same paragraph of the bill as printed, showing that this patent was recorded in the office of the County Recorder of Lewis County, Washington, Sept. 29, 1906.)

A patent for the W. 1/2 of N. W. 1/4, the S. E. 1/4 of N. W. 1/4 and the N. E. 1/4 of S. W. 1/4 of section 32, township and range aforesaid issued to appellee Charles S. Forbes November 8, 1905.

A patent for the N. E. 1/4 of N. W. 1/4 of section 32, township and range aforesaid, issued to appellee John H. Patten December 30, 1907.

It is charged that these patents were issued under entries and applications for the purchase of the land made by the respective patentees. The nature of these entries is not disclosed in the bill. There was no contest in the Land Office between any of these patentees and appellants, nor is it claimed that the patents were obtained by fraud. The contention is that appellants, by their prior selections, none of which was approved, acquired an interest in these lands sufficient to charge the subsequently conveyed title of the patentees with a trust in favor of appellants, which entitles appellants to a conveyance of

the legal title so acquired. Inasmuch as there is no claim of fraud, the only questions involved are the sufficiency of the allegations of the bill to show the acquisition by appellants of an interest in the lands, which would control the legal title when conveyed from the United States by patents issued. It will be more convenient to point out the defects in the bill in connection with the discussion of the points made against the sufficiency thereof.

ARGUMENT.

I.

BY WHOM AN ACTION AGAINST A PATENT ISSUED BY THE UNITED STATE MAY BE MAINTAINED.

The Land Department of the United States is a quasi judicial tribunal charged with the duty of supervising the disposition of the public lands under the Acts of Congress, and the patents of the United States operate not only as deeds conveying the legal title to the lands embraced in the patent to the grantee, but they are also evidence of an adjudication by the officers of the Interior Department that the lands so conveyed were public lands subject to be so conveyed, and that the patentee has complied with all of the provisions of the particular act of Congress under which the patent is issued entitling him to a conveyance thereof. This determination, in all cases where the Department has jurisdiction, is not subject to collateral attack and is, in the absence of fraud or mistake of law, conclusive. Of course, if the land with which the proceeding before the Department is concerned, is not public land of the United States, over which the Department has jurisdiction under the authority of the public land laws, the decision of the Department with respect thereto is a nullity.

Doolan v. *Carr,* 125 U. S., 618.

But where the Department has jurisdiction of the land, it belonging to the United States and being subject to disposition under the public land laws, the patent when issued operates, as above stated, to convey to the patentee the legal title. If, however, through fraud or mis-

take of law the legal title is thus conveyed to and vested in A, although B was in equity entitled thereto, B can maintain an action to have A declared a trustee, holding the title to the land for his benefit, and require a conveyance thereof to B. It is upon this theory that the bill was filed. It is evident, however, that parties who do not connect themselves with the United States, showing a right or interest derived from the United States, cannot be heard to assail the judgment of the Interior Department, or the conveyance issued by the United States pursuant thereto. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect thereto, and one who fails to connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent, cannot be heard to complain.

> "To charge the holder of the legal title to lands under a patent of the United States as a trustee of another and to compel him to transfer the title, the claimant must present such a case as will show that he was entitled to the patent from the Government, and that in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant."
>
> *Bohall* v. *Dilla,* 114 U. S., 47, 50-1.
>
> *Lee* v. *Johnson,* 116 U. S., 48, 49-50.
>
> *Sparks* v. *Pierce,* 115 U. S., 408, 412-413.
>
> *Smelting Co.* v. *Kemp,* 104 U. S., 636, 647.
>
> *Duluth & I. R. R. Co.* v. *Roy,* 173 U. S., 587, 590.
>
> *Burke* v. *S. P. R. R. Co.,* 234 U. S., 669, 692, 711.
>
> *Campbell* v. *Weyerhaeuser* (C. C. A.), 161 Fed. Rep., 332, 333.

This does not mean that complainant must show that he was entitled to the patent at the time it was issued to defendant, but it requires that the claimant against the patent must show such a condition of facts existing as would have enabled him to secure the patent for the land, if not obstructed or prevented.

Duluth & I. R. R. Co. v. *Roy,* 173 U. S., 587, 590-1.
Loney v. *Scott,* 112 Pacific, 172.

But even with this modification it is imperative that appellants show that they are in privity with the United States and that they had, at the time the patent was issued, such a claim to the land as would under the laws of the United States have ripened into a perfect title but for the issuance of the patent under which appellees assert title.

II.

THE AMENDED BILL OF COMPLAINT FAILS TO ALLEGE FACTS SHOWING THE EXISTENCE OF AN INTEREST IN APPELLANTS WHICH WOULD HAVE RIPENED INTO A TITLE IF THE PATENTS COMPLAINED OF HAD NOT BEEN ISSUED.

The sufficiency of the allegations to show an interest in appellants of a character which would enable them to maintain their suit must be considered from three standpoints:

(A) Whether the allegations are allegations of fact by which the court can see that the appellants acquired rights, or are mere allegations of legal conclusions.

(B) The sufficiency of the allegations, assuming that they are of facts, to show the acquisition of an interest by virtue of the first selection.

(C) The sufficiency of the allegations, again assuming that they are of facts, to show the acquisition of an interest under the second selection.

(A) The allegations relied upon as showing a valid appropriation of the land under the selection of March 29, 1900, are:

That prior to March 29, 1900, F. A. Hyde & Company, a corporation, were the owners, under a United States patent, of lands in sections 16 and 36, township 9 north, of range 28 west, S. B. M., in California; that thereafter and prior to said March 29, 1900, these lands, amounting to 1120 acres in all, were included within the limits of the Pine Mountain & Zaca Lake Forest Reserve, established by the President of the United States. Then follows the following allegations:

> "The said F. A. Hyde & Company, the owners thereof, under and pursuant to the provisions of the Act of Congress of June 4th, 1897, and other acts of Congress applicable and under and pursuant to the customs, rules and regulations in force in and observed by the General Land Office and officials of the Land Department of the United States, did relinquish the said tract or tracts amounting to 1120 acres so included in the Pine Mountain and Zaca Lake Forest Reserve; and did duly convey the said lands so relinquished to the Government by deed duly filed for record and recorded in the Public Records of the State of California, and did duly furnish the United States officials with an abstract of title duly authenticated, showing chain of title of land so relinquished from the Government back again to the United States, and that in lieu of the lands so relinquished and on or about March 29th, 1900, said F. A. Hyde & Company did make application for an entry upon the West Half (W. 1/2) of Section 32, Township 11 North, Range 4 East of the Willamette Meridian (together with certain other lands, the total amount of lands so selected amounting to 1120 acres in all), all situate in the County of Lewis, State of Washington; that the lands so relinquished, situate in the State of California, had all been patented by the United States and the said F. A. Hyde & Company were the owners thereof under such patents. That the said land so selected, to wit: The West half

(W. 1/2) of Section 32, Township 11 North, Range 4 East, W. M., was on said March 29, 1900, vacant, non-mineral, public lands, subject to homestead entry, and did not exceed in area the tract covered by the lands so relinquished and surrendered; that the said application was duly made and received and filed in the office of the United States Land Office at Vancouver, Washington, and the said F. A. Hyde & Company furnished said officials of said land office with an abstract of title duly authenticated, showing the title of the land so relinquished from the Government back to the United States, and also furnished due proof that said lands so selected in lieu thereof were vacant, unoccupied, non-mineral public lands open to entry and settlement, and in all other respects complied with the laws, rules and regulations of the Government applicable, and the said application was filed and proof was made and received in the said United States Land Office at Vancouver, Washington, and in accordance with the customs, rules, and regulations in force and generally observed in said Department by the officials thereof, and by persons having business therein, and the said F. A. Hyde & Company, and their successors in interest, thereupon became the equitable owners and entitled to a patent to the said lands." (Tr., 6-7.)

The allegations relied upon as showing a valid selection and appropriation of the land under the second selection made March 3, 1902, are:

"Said F. A. Hyde & Company, pursuant to the terms of said Act of June 4, 1897, and pursuant to the customs, rules and regulations in force in and observed by the General Land Office and officials of the Land Department of the United States, made a second selection and application for an entry upon the said West half ($W\frac{1}{2}$) of said section 32, township 11 North, range 4 East, of the Willamette Meridian, in lieu of certain other base land formerly owned by said F. A. Hyde & Co., and theretofore surrendered to and accepted by the United States Government in accordance with the provisions of said Act of June 4, 1897, and made due proof of all facts required to be proven under the terms of said Act to entitle said F.

A. Hyde & Co. to the land so selected. Said selection was made in writing as required by law, and the said paper, together with certificates, affidavits, and other papers therein referred to, and as required by the rules and practice of the United States Land Department, were duly filed with the United States Land Office at Vancouver, Washington, on said March 3, 1902; that at the time of filing said second application and selection of said land, the said land was a part of the surveyed public lands of the United States, unappropriated and subject to entry and selection as aforesaid, and by virtue of the said second application thereof and entry thereon as aforesaid, by the said F. A. Hyde & Co., and the complainants, the said F. A. Hyde & Co., their successors and assigns, thereupon became the equitable owners of said land, and became entitled to patent therefor; that prior to the time of making said second selection, the said F. A. Hyde & Co. were the owners under patent from the United States of the Northeast Quarter (NE¼) and the Southeast Quarter (SE¼) of Section 16, Township 9 North, Range 28 West of San Bernardino Meridian, and containing 320 acres, situate in the State of California, and that the lands so owned had subsequent to the patenting of the same by the United States been included within the boundaries of the Pine Mountain and Zaca Lake Forest Reserve, and that the said F. A. Hyde & Co., as the owners thereof, had duly relinquished and re-conveyed the said lands to the United States, and that the said second application made by the said F. A. Hyde & Co. for the said West Half (W½) of said Section 32, Township 11 North, Range 4 East, was so made by them in lieu of said 320 acres of land so relinquished, and that the said second application was accompanied by an abstract of title duly authenticated and certified, showing chain of title to the land so relinquished from the Government back again to the United States, together with due proof from the public officers showing that the said land so relinquished was free from incumbrances of any kind, and that all taxes thereon to the date of said second application had been paid, together with affidavits showing the said lands so selected in lieu thereof were non-min-

> eral and non-saline in character and unoccupied, and that the said F. A. Hyde & Co. in all other respects conformed to the Acts of Congress and laws of the Land Department of the United States." (Tr., 8-9.)

These allegations, it will be noted, do not set forth copies of the papers filed, or any matters from which the court can determine for itself the legal sufficiency of the acts under the statute of June 4, 1897, and the rules and regulations of the Department to be followed thereunder. The deeds by which it is charged that Hyde & Company "duly" conveyed the lands relinquished to the Government, do not appear in the pleading, nor is the abstract of title set forth. The bill contains no information as to the form or contents of the application filed in the Land Office, nor does it contain any information as to the character or nature of the proof furnished, that the lands selected were vacant, unoccupied, non-mineral public lands open to entry and settlement. In lieu of these facts the pleader has contented himself with alleging that the 1120 acres assigned as the basis of the first selection were relinquished "under and pursuant to the provisions of the Act of Congress of June 4, 1897, and other acts of Congress applicable, and under and pursuant to the customs, rules and regulations in force and observed by the General Land Office and the officials of the Land Department"; that Hyde & Company "did duly convey" "by deed duly filed" the relinquished lands to the Government; that they "did duly furnish the United States officials with the abstract of title duly authenticated, showing a chain of title of lands so relinquished from the Government back again to the United States"; that such first application "was duly made and received and filed in United States Land Office at Vancouver, Washington"; that Hyde & Company "furnished due proof that said lands so selected in lieu thereof were vacant, unoccupied, non-mineral public lands open to entry

and settlement and in all other respects complied with the laws, rules and regulations of the Government applicable"; that they made the second application "pursuant to the terms of said Act of June 4, ~~1907~~ 1897, and pursuant to the customs, rules and regulations in force in and observed by the General Land Office and officials of the Land Department of the United States"; that this application was made in lieu of lands "surrendered to and accepted by the United States Government in accordance with the provisions of said Act of June 4, 1897"; that Hyde & Company "made due proof of all facts required to be proven under the terms of said act" to entitle them to the lands so selected; that said selection was made in writing and the said paper "together with certificates, affidavits and other papers therein referred to and as required by the rules and practice of the United States Land Department were duly filed with the United States Land Office at Vancouver, Washington"; that Hyde & Company, as the owners of the base land had "duly relinquished and conveyed the said lands to the United States"; that the second application was "accompanied by an abstract of title duly authenticated and certified showing chain of title to the lands so relinquished from the Government back again to the United States, together with due proof from the public officers showing that the land so relinquished was free from encumbrances of any kind, and that all taxes thereon to the date of said second application had been paid"; that Hyde & Company "in all other respects conformed to the Acts of Congress and laws of the Land Department of the United States."

These allegations merely set forth the conclusions of the pleader. Whether the deeds purporting to convey the base lands to the United States were executed in such form as to transfer the title, if the grantors were vested

therewith, the court has no means of knowing beyond the opinion of the pleader. Whether such conveyance conformed to the rules and regulations of the Interior Department the pleading does not show, although it does show that the pleader believed that they did. While the pleading charges that due proof of all the facts required was made, it contains no intimation either as to the evidence offered or as to the facts with respect to which evidence was offered. While it charges that the second selection was made in writing by filing the written selection, together with certificates, affidavits and other papers therein referred to and as required by the rules and practice of the Land Department, it does not show the contents of the written selection, nor what certificates, affidavits or other papers were therein referred to, or were filed therewith. It thus totally fails to show facts by which the court can determine whether the applications would have been sufficient in form, even if the lands were open to selection. With reference to the lands assigned as a basis for the first selection, it is not alleged that they were free from liens or encumbrances when tendered to the Government. The allegation is one that an abstract was furnished showing title of the lands so relinquished from the Government back to the United States. The allegation with respect to the condition of the lands offered as a basis for the second selection is merely that an abstract was furnished showing chain of title from the Government back again to the United States, together with due proof showing that the land so relinquished was free from encumbrances of any kind, and that all taxes thereon to the date of the second application had been paid. It is not, however, alleged that such lands were in fact free from liens or encumbrances, nor is the character of the proof of this fact in any way designated, except by the pleader's conclusion that it was due proof from public officers.

We submit that this showing is insufficient where, as here, the claimant seeks to strike down a legal title issued by public officials in the exercise of jurisdiction conferred upon them. He must allege facts showing definitely the error of which he complains and also showing that he himself had rights which gave him a preferential claim to the land. Every presumption in favor of the correctness of the action of the officers of the Interior Department is to be indulged and only upon allegations showing that such action was erroneous can it be attacked. And inasmuch as the court is unable to see from the allegations of fact, independent of the pleader's conclusions, that there was erroneous action upon the part of the public officials, or that appellants had any interest in the lands which would support an attack upon the patents so issued, the complaint is insufficient.

James v. *Germania Iron Co.* (C. C. A.), 107 Fed. Rep., 597, 600-1.

Durango Land & Coal Co. v. *Evans*, 80 Fed. Rep., 425, 429-31.

Le Marchel v. *Teagarden* (C. C. A.), 152 Fed Rep., 662, 665-6.

Moran v. *Bonynge*, 107 Pac. Rep., 312.

As the allegations fail to show facts essential to connect the appellants with the title of the Government, even if the filing of a proper application under the act of June 4, 1897, would have that effect, the bill fails to show any right or interest in appellants sufficient to support their contention that the patents should be held in trust for their benefit.

(B) The Application of May 29, 1900.

Assuming, without conceding, that the allegations of the bill show a sufficient relinquishment of base lands, and the filing in the District Land Office of an applica-

tion with proofs sufficient in form, the conclusion that the application of May 29, 1900, operated to appropriate the selected lands and vest an interest therein in the appellants by no means follows. It is charged in the bill that the Interior Department rejected this application on or about December 21, 1901, upon the ground that it was improperly made at a time when the selected lands were not subject to such selection. (Tr., 7.) In the third paragraph of the bill (Tr., 5) it is charged that the State, on the 25th of January, 1899, requested a survey of the public lands in Township 11 north, Range 4 east, W. M., Washington (in which township the lands in question are situated) pursuant to the provisions of the Act of August 18, 1894; that the land was at this time unappropriated, unsurveyed public land, and that it was surveyed pursuant to the request of the state, and the township plat filed in the Land Office April 10, 1901; that pursuant to the provisions of this act of August 18, 1894, the State was allowed a period of sixty days after the filing of the plat within which to select lands, presumably for the purpose of filling its land grants; that the state filed its selection lists June 6, 1901, but did not include the land in controversy therein. As this attempted selection was made March 29, 1900 (see Tr., 6), it appears that the attempted selection was made after the state had requested the Commissioner of the General Land Office to survey these lands, but prior to the date when the survey was completed by the filing of the approved plat thereof in the District Land Office and also prior to the expiration of the time during which the state had a preference right of selection. Under these conditions the lands in question were not open to selection at the time appellants' application was made, and it was properly rejected.

(1) Under the provisions of the federal statutes pro-

viding for the surveys of public lands, such lands are not deemed surveyed until the township plat has been approved and filed in the District Land Office.

S. P. R. R. Co. v. *Burlingame,* 5 L. D., 415, 417, and cases cited.

U. S. v. *Curtner,* 38 Fed. Rep., 1, 9-10.

And the effect of the survey is not to identify but to create the sections and townships.

> "Even after the principal meridian and a base line have been established and the exterior lines of the townships have been surveyed, neither the sections nor other subdivisions can be said to have any existence until the township is subdivided into sections and quarter sections by an approved survey. The lines are not ascertained by the survey but they are created, and although a surveyor may, in advance of the making of the subdivision of the township by the deputy of the United States Surveyor General, run lines with the greatest practical exactness from the corners established on the exterior lines of the township to ascertain the bounds of any given quarter corner, still when the survey comes to be made under the direction of the Surveyor General the difference between the two surveys may be such that the forty acre lot which, under the private and theoretically the more accurate survey, appear to fall within the lands listed to the state, will be excluded from the list, or vice versa."

Robertson v. *Forrest,* 29 Calif., 317, 325.

Middleton v. *Low,* 30 Calif., 596, 604-5.

Bullock v. *Rouse,* 81 Cal., 590; 22 Pac. Rep., 919, 920.

Smith v. *City of Los Angeles,* 158 Cal., 702; 112 Pac. Rep., 307, 310.

It follows that the application of Hyde & Company, made March 29, 1900, for the W½ of Section 32, Township 11 north, Range 4 east, W. M. *eo nomine* was an impossibility, for such government subdivisions did not then exist.

(2) By an act approved August 18, 1894 (28 Stat. at L., 372, 394-5; 6 Fed. Stat. Ann., 374), Congress further provided that it should be lawful for the governors in certain states, including the State of Washington, to apply to the Commissioner of the General Land Office for the survey of any township remaining unsurveyed, with a view to satisfying the public land grants made by the several acts admitting said states into the Union; that upon the application of the Governor the Commissioner should immediately notify the Surveyor General of the application, and the latter should have the surveys so applied for, made. The act further provided:

> "And the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands: And provided further, That the Commissioner of the General Land Office shall give notice immediately

> of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided."

That lands reserved pursuant to the provisions of this act are not public lands open to the initiation of rights until the termination of the reservation is clear. If any doubt could remain, in view of the direct command that the lands "shall be reserved," it is removed by the express provision that "*after* the expiration of such period of sixty days any lands which may remain unselected by the state, * * * shall be subject to disposal under the general laws as other public lands." And that this statute operates to reserve such lands is the settled doctrine of the Interior Department.

> *Ziegler* v. *State of Idaho*, 30 L. D., 1.
> *McFarland* v. *State of Idaho*, 32 L. D., 107.
> *Kay* v. *State of Montana*, 34 L. D., 139.
> *Thorpe et al.* v. *State of Idaho*, 35 L. D., 640; id., 26 L. D., 479.

And see:

> Regulations of the Interior Department promulgated under a similar act of May 10, 1893, 16 L. D., 462.

It is charged in the third paragraph of the bill that the lands in controversy were embraced in an application for a survey made on behalf of the State of Washington January 25, 1899; that the township plat was filed April 10, 1901, and that the sixty days during which the lands were reserved under the provisions of the act of August 18, 1894, expired June 9, 1901. They were therefore lands reserved pursuant to the statute at the time the application was made to select them as forest reserve lieu lands, March 29, 1900. The decision of the Secretary

of the Interior rejecting this selection upon this ground, as alleged in the fourth paragraph of the bill (Tr., 7), was correct. The right of selection, in lieu of patented lands included within forest reserves, given by the act of June 4, 1897, was in terms confined to "a tract of vacant land open to settlement." (7 Fed. Stat. Ann., 314.) And as the right to settle upon lands of the United States is confined to the public lands and does not include a right of settlement upon withdrawn or reserved lands, these reserved lands were not, during the continuance of the reservation, subject to selection in lieu of patented lands included within forest reserves.

It is charged in the bill that there was in force and generally observed in the Land Department of the United States, and particularly in the land office at Vancouver, a custom, rule and regulation whereby such applications as those made by Hyde & Company were received and filed and held notwithstanding the reservations, until the reservation terminated, at which time they became effective. Inasmuch as the court takes judicial knowledge of the rules and regulations promulgated by the Interior Department (*Caha* v. *U. S.*, 152 U. S., 211, 221; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S., 301, 309) it will judicially know that this allegation of a rule or regulation is without foundation in fact, since no such rule or regulation was ever promulgated. Nor would it be material if such rule or regulation had been promulgated. Departmental rules and regulations cannot set aside or annul positive provisions of federal statutes; and since the statute excluded these reserved lands from right of selection when this selection was attempted to be made, the attempt was nugatory and vested no rights whatsoever in Hyde & Company or appellants.

(3) By the subsequent attempted selection of this land made by Hyde & Company March 3, 1902, that com-

pany and appellants, as claiming under it, acquiesced in the rejection of the original attempted selection of March 29, 1900, and waived any rights which might otherwise have existed thereunder. The right of selection given by the Act of 1897 is confined to vacant land open to settlement. Appellants cannot therefore be heard to contend that the attempted selection of March 29, 1900, operated to appropriate this land, and at the same time contend that it was vacant land open to settlement in 1902. And when, March 3, 1902, they made the second application basing it upon a claim that this land was vacant and open to settlement, they of necessity abandoned all claims under the original attempted selection. If the attempted selection of March 29, 1900, did not take the land out of the category of lands open to settlement March 3, 1902, it could not take such lands out of that category at the time the patentees entered thereon. The only escape from this conclusion is by holding that the selection of March 3, 1902, was amendatory merely of the selection of March 29, 1900. If this contention is made, the amendatory selection is subject to all objections which were fatal to the original selection. If the original selection was void, it could not be amended.

(4) The act of June 4, 1897, does not contemplate the initiation of any right in one seeking to select lands in lieu of patented lands included in a forest reserve, however regular his application may be, by mere act of relinquishing the base lands and filing his application in the District Land Office. Inasmuch as this proposition will be discussed fully in the consideration of the application of March 3, 1902, we pass the discussion thereof at this place, noting only that what is said under this point in the discussion of the second application is equally applicable to the application of March 29, 1900.

(C) The Application of March 3, 1902.

Assuming, as in consideration of the application of March 29, 1900, but without conceding, that the allegations of the bill show an application made by Hyde & Company on behalf of the appellants to select the lands in controversy, and that the applications were duly made and in conformity with the rules and regulations, the conclusion charged in the bill, that thereby F. A. Hyde & Company and appellants, as their successors and assigns, became the equitable owners of the land selected and entitled to a patent therefor, does not follow. The facts charged with respect to this application, disregarding all legal conclusions, are briefly as follows:

That on March 3, 1902, Hyde & Company, acting for appellants, selected the lands in controversy in lieu of certain base lands which had previously been surrendered to and accepted by the United States; that this selection was made by filing a written application for the land, accompanied by an abstract of title and proofs showing that the base lands had been properly conveyed to the United States, were free from encumbrances and taxes, and that the selected lands were vacant, non-mineral and non-saline in character. It is then charged:

> "That the said second application, with all papers accompanying the same, were duly received and filed by the officers of said Land Department at Vancouver, Washington, and duly forwarded to the Commissioner of the General Land Office at Washington, D. C., for consideration and approval, all in accordance with the acts of Congress applicable thereto." (Tr., 9.)

It is further charged that shortly after the filing of this second application, to wit, about November 21, 1902, the Land Department promulgated a rule and order suspending all further proceedings upon entries made with

any of the so-called "Hyde Scrip," which order is still in force; that this order affected the second application and that no action has been taken by the Department since said date, upon such second application. (Tr., 11.) It thus appears, that all Hyde & Company or appellants have done toward acquiring the title to these lands is to file in the District Land Office at Vancouver, their selection with proper proofs; that this selection was transmitted to the office of the Commissioner of the General Land Office for consideration; and that that official has taken no direct action thereon, although it is conceded that by the issuance of patents to appellee's for this land, the Department has indirectly rejected the application. The question is therefore, whether, by the mere filing of a selection with proper proofs in the Land Office, a selector under the Act of 1897 acquires any interest in the lands which he is seeking to select. The act provides:

> "That in cases in which a tract covered by an unperfected *bona fide* claim, or by a patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; provided further that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."
>
> 30 Stat. at L., 636; 7 Fed. Stat. Ann., 314.

The Secretary, as authorized by the act, promulgated certain rules and regulations for the purpose of carrying it into effect. (24 L. D., 589, 592.) These rules provide:

"16. Where final certificate or patent is issued,

it will be necessary for the entryman or owner thereunder to execute a quit claim deed to the United States, have the same recorded on the county records and furnish an abstract of title duly authenticated showing chain of title from the Government back again to the United States.

18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with a report as to the status of the tract applied for."

In *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S., 301, 310, *et seq.*, this court, construing this act and the regulations, held that the land officers had no functions to perform except to forward the application to the Commissioner of the General Land Office; that the filing of the papers in the Land Office did not, and could not, make out an equitable title in the selector and that a complete equitable title was not made out and could not exist until there had been a favorable decision by the Commissioner regarding the sufficiency of the proof of the right to the selected land. Answering a contention that the selector became the equitable owner of the land by the relinquishment of his title to the base land, the court held that such relinquishment constituted a mere offer; that the duty of passing upon the proofs tendered was in the Commissioner and not in the Land Officers, and that until the Commissioner had passed upon and accepted the proofs tendered, there was no acceptance of the offer and no equitable estate created in the applicant. It was further said:

"There must be a decision made somewhere regarding the rights asserted by the selector of land under the act before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute and the selector cannot decide the question for himself. * * *

Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted Rule 18 above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector so that he became vested with the equitable title to the land he assumed to select."

In *Roughton* v. *Knight*, 219 U. S., 537, the court said:

"Upon its face the act is neither more nor less than a proposal by the Government for an exchange of claims to lands unperfected, or lands held under patent situated within the exterior lines of a forest reservation, for an equal area of public land subject to entry elsewhere. * * *

To take advantage of the proposal contained in this act the applicant must select the land he wishes to receive in lieu and file a sufficient relinquishment of land within a forest reserve. *Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency and an assent to the particular selection made in lieu.*" pp. 546-7.

In *Pacific Live Stock Co.* v. *Isaacs*, 52 Ore., 54; 96 Pac. Rep., 460, 464, the court said:

"No competent proof, however, of any relinquishment and selection by Hyde was offered, but waiving such matters and conceding that such proof was offered, does that invest him with any right in or to the lands so selected as against even a mere trespasser at any time before final acceptance thereof by the Secretary of the Interior, or the issuance of a patent? Whatever right he may eventually acquire in such selected lands is not based upon a settlement thereon impliedly or expressly required by the Government as a condition precedent to the acquisition

> of title, as would be the case of a homesteader or pre-emptioner, but, in its essence, it is a mere exchange of lands, and neither party acquires any legal or equitable title in the lands proposed to be exchanged until the acceptance or final consummation thereof."

In *U. S.* v. *McClure*, 174 Fed. Rep., 510, the court held that the title to the land sought to be relinquished did not pass from the owner or vest in the United States, notwithstanding the execution and recording of the deed, until there was an acceptance of the tender by an approval of the selection. The court said:

> "The title does not pass to the land offered in exchange until the deed is accepted. The mere execution and recording of a deed and the tender thereof, vests no title in the Government. Until the deed and title are examined and approved, it is a mere assertion by the applicant of his title and right to make the selection. * * * But the equitable, if not the legal, title remains in him. The deed and tender thereof amounts to nothing more than an offer by the owner to exchange one tract of land for another, and the title does not pass to either party until the exchange is effected. Until the deed is accepted, the owner of the land offered in exchange retains title thereto." pp. 511-12.

This ruling was affirmed in *McClure* v. *U. S.*, 187 Fed. Rep., 265, 267.

In *Daniels* v. *Wagner*, 194 Fed. Rep., 973 (affirmed in United States Circuit Court of Appeals, 205 Fed. Rep., 235, 125 C. C. A., 93), it was held that the mere filing of an application to select lands under the forest reserve act, however regularly performed and although accompanied with the recording and tender of a proper deed conveying the base lands to the United States, did not under the statute operate to vest in the applicant any title or right to the lands selected by him, and that where, notwithstanding such attempted selection, the lands were subsequently patented to another, the selector could not main-

tain an action like the one at bar to secure a conveyance to himself of the legal title from the patentee. That case is, upon this point, identical with the case at bar, except that it appeared there that the application to enter the lands selected had been acted upon and rejected by the Land Department, while in the case at bar it is alleged that the Land Department has failed and neglected to take any action upon the application whatsoever.

The decisions establish the following propositions:

(1) That the act of 1897 but authorizes an exchange of lands between the settler or owner of land within a forest reserve and the United States;

(2) That the initiatory step in such exchange must be taken by the citizen by recording a conveyance of his land to the United States and tendering such conveyance, with proofs of good title in himself, and applying with such tender for the tract of land which he desires to obtain in lieu of that which he offers to surrender to the Government;

(3) That although the application is made through the District Land Office, its officers have no authority to take any action thereon which will bind the Government. Their duty is to forward the application, together with a report upon the status of the land applied for, to the Commissioner. They are agents for the purposes of transmission only. They can neither accept the land tendered nor give any right to the land applied for.

(4) That until the application to exchange the lands has been acted upon favorably by the Commissioner, there is no acceptance of the proposition of the applicant to exchange lands. He is not divested of the title to the lands offered to be surrendered and acquires no right or title to the lands sought to be selected.

(5) 'That the jurisdiction to pass upon the sufficiency of the title of the lands offered in exchange for the selection, and upon the proofs, and upon the status of the lands applied for, is vested exclusively in the Commissioner, subject to review on appeal by the Secretary of the Interior.

The statute authorizing such selection prescribes that no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected, and that under the rules and regulations promulgated by the Interior Department, there is no direction that the district land officers shall note the application upon their books and no record is required to be made in the district land office of the application.

Inasmuch as the bill discloses that all that was done by their grantor, Hyde & Company, or themselves, was to record the deed conveying the base land to the Government and tender their application with abstract of title to the base land to the District Land Office, by which office the same was transmitted to the Commissioner who, it is alleged, never acted thereon, it is apparent that appellants' offer of exchange was never accepted, that they retain the title to the base lands which they offered to exchange, and that they never acquired any right to or interest in the lands which they sought to select. They have paid no fees and incurred no obligations. Under these conditions they have failed to establish the privity between themselves and the Government which is essential to vest in them the right to maintain an action of this nature. Having no right or title to or interest in this land, they cannot control the disposition of the title by the Government, or require that the title, if transferred by the Government, be divested from the transferee to themselves.

This conclusion is strongly supported by a consideration of the effects of a contrary ruling.

(a) We have shown that the statute and regulations under which the exchange of private lands within a forest reserve for public lands elsewhere is permitted, vest in the Commissioner of the General Land Office the exclusive jurisdiction, subject only to review by the Secretary of the Interior, of passing upon and determining the sufficiency of the title which is offered to the Government in exchange for public lands. If the court should hold that appellants can maintain this action, it cannot now require the Commissioner to perform these functions but must substitute for the judgment and discretion vested in the Commissioner by law to be exercised in performing these duties, the judgment and discretion of the trial court. Whether the abstract submitted was sufficient, whether the appellants had good title to the lands tendered to the Government, whether that title was free from liens and encumbrances or other objectionable features for which the Commissioner might properly refuse to accept it, could now be determined by the court only, which, in that case, would perform functions vested by law in the Land Department. It would substitute for the tribunal provided by Congress, another tribunal and one not contemplated by the statute. This, we submit, cannot be done. The remedy, if any, is an action by the United States to cancel the patents which have been issued. The situation presented here is not a case where the officers of the Land Department, by fraud or mistake of law, have issued a patent to one to which another was entitled, but according to the allegations of the bill, the Land Department entirely failed to act upon the application, or to pass upon evidence which, if considered, might have resulted in a determination in favor of appellants, but which also might have resulted in an adverse deter-

mination. The bill thus is one calling upon the courts to substitute their judgment and discretion for that which the law vested in the executive department.

(b) Inasmuch as appellants have paid no fees and have not parted with title to the base lands, a decree requiring the conveyance to them of the patent titles, which appellees hold, would give them the legal title acquired by entry and purchase by the appellees, and leave them vested with the title to the base lands which were offered to but not accepted by the United States. Such ruling would place appellees in a much better position than they would have occupied if their application had been accepted, the base lands conveyed to the Government, and they had been awarded a patent for the selected lands. The United States has received the fees and purchase price paid by appellees upon their entry of the lands in controversy, and is out nothing whichever way the present action results, but an adverse decision deprives appellees of property which they have purchased, and gives to appellants the lands applied for in addition to the base lands, from title to which they have never been divested. Clearly such a result is inequitable and a theory of the law which produces such result should not be adopted in the absence of clear, express statutory provisions.

That the bill fails to show an interest in appellants sufficient to maintain this action, is directly supported by the decision of the Circuit Court of Appeals for the Ninth Circuit, in *Daniels* v. *Wagner,* 205 Fed. Rep., 235; and is clearly within the principles announced by the Court of Appeals for the Eighth Circuit in *Campbell* v. *Weyerhaeuser,* 161 Fed. Rep., 332. In this case, Campbell, the plaintiff, had repeatedly made application to enter the land there in question under the Timber and Stone Acts, and his application had each time been re-

jected. Subsequently, and without any preliminary contest, the land was patented as indemnity land under a selection made by the Northern Pacific Railway Company. Campbell brought an action similar to the one at bar. The court said:

> "The indispensable basis of a suit in equity to charge the legal title to land under a patent, is an equitable interest in the land in the complainant which is superior to the legal title in the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open to entry thereunder, is not, and no one can convert it into, such an interest in land, by making an application to purchase which the officers of the land department unlawfully deny. The right to an allowance of such an application is a privilege merely, and not an equitable interest or title. The applicant acquires no equitable interest in the land by his application and its denial, and, in the absence of such an interest, no suit in equity can be maintained.
>
> Irreparable injury is conclusively presumed from the refusal of one to perform his contract to convey real property, and it is upon that ground that suits in equity to charge titles under patents with trusts for vendees, are maintained; but there is no presumption of irreparable injury from the unlawful refusal of the government to sell land in which the applicant has secured no equitable interest, and hence, such a refusal will not sustain a bill in equity. The applicant pays nothing for the tract he is refused permission to buy, his loss by the refusal is measurable in damages. He may purchase another tract, and, if courts of equity should entertain suits upon such applications and denials, they would become courts for the production, rather than for the prevention, of a multiplicity of suits (pp. 333-4)."

It was contended by appellants in the District Court (no brief was filed or argument made by them in the Court of Appeals) that this decision was in effect reversed by the Supreme Court, but we submit this was error; the decree of the Court of Appeals was affirmed.

Campbell v. *Weyerhaeuser,* 219 U. S., 424.

The affirmance was not based upon the grounds stated in the opinion of the Court of Appeals, but upon the principles announced in *Weyerhaeuser* v. *Hoyt*, 219 U. S., 380, which, together with *Northern Pacific Railway Company* v. *Wass*, 219 U. S., 426, was argued with the Campbell case. The appellants contended, however, that the principles announced in *Weyerhaeuser* v. *Hoyt*, although they resulted in an affirmance of the Campbell case, in effect reversed the doctrine of the Court of Appeals, expressed in the quotation from the opinion of that court in the Campbell case above given. We submit that this contention is unsound and that nothing that was said by this court in its opinion in *Weyerhaeuser* v. *Hoyt* was inconsistent with the rule announced by the Court of Appeals in its decision of the Campbell case.

In *Weyerhaeuser* v. *Hoyt* the appellant asserted title under a patent issued to the land as indemnity land, pursuant to the provisions of the land grant made to the Northern Pacific Railroad Company. The appellee asserted an equitable title as the result of a purchase made under the Timber and Stone Act. The Railway Company filed a selection for the land in question as indemnity land in 1883, and filed a rearrangement, or amendatory, list in 1893.

The Interior Department having ruled that the eastern terminus of the Northern Pacific land grant was at Duluth, and the selections being of lands east of Duluth, the lists were canceled. In 1900 this court decided that the eastern terminus of the Northern Pacific land grant was at Ashland, a point east of Duluth, and the Secretary thereupon reinstated the selection lists which had been canceled under the former ruling. The selections were subsequently approved and patents issued, under which Weyerhaeuser claimed title. During the time in-

tervening between the cancellation of these lists and their reinstatement by the Secretary, the appellee's grantor applied to purchase the land under the Timber and Stone Act, made his final proof and paid the purchase money. It was noted, however, upon the receipt issued to him, that his rights were "subject to any claim the Northern Pacific Railroad Company may have to the lands herein described." When the selections of the Railway Company were approved, the entry of Jones was canceled. Hoyt, as Jones' grantee, having brought suit to compel a conveyance of the land by the grantee of the Railway Company, the question presented was, as to which party had the better right to the land.

The Court of Appeals, holding that the Railway Company acquired no interest in the land prior to the approval of its selections—which approval was subsequent to the entry by Hoyt's grantor—decreed the conveyance prayed by Hoyt. The case was appealed to this court, where the principal question discussed was as to whether the Railway Company, by its prior selection, had acquired an interest in the land, which upon the approval of that selection by the Secretary, was superior in right to the subsequent entry by Jones. It was held by a majority of the court (Justices Harlan and Day dissenting) that the Railway Company, by its selections, acquired an interest in the land which was perfected by the subsequent approval of such selections by the Secretary and the issuance of the patent; that the title thus perfected was prior in kind and superior in right to the claim initiated by the entry of Jones.

There was no conflict between the ruling by this court in the Hoyt case and the ruling by the Court of Appeals in the Campbell case that one who made an application to enter land under the Timber and Stone Act, which was

rejected, acquired no interest in such land and could not maintain an action to compel a conveyance to him of the title issued to a subsequent patentee, between whom and the applicant there had been no contest. The Weyerhaeuser case held merely that a selection which, by approval and patent, had ripened into a perfect title, vested a right superior to an entry made subsequent to the selection.

The Campbell case held that one who had made an application to purchase land, which was rejected, neither purchase price nor fees being accepted, acquired no interest in the land and was not in privity with the United States, and that he could not, therefore, maintain an action in equity to compel a conveyance to him by a subsequent patentee.

Appellants are in no better—even if in as good—position, than was Campbell in the case against Weyerhaeuser. They made an application to exchange lands, paying no fees and retaining title to the land offered by them to the government. Their offer was never accepted or acted upon. Clearly, such unaccepted offer gave them no equitable interest in the land and vested in them no right to control the title subsequently conveyed by the patents issued under which appellees now hold.

Weyerhaeuser v. *Hoyt, supra,* is further relied upon as determining that some interest vests by virtue of the selection. That that case determines that an interest is acquired by a Railway Company by filing a proper selection for indemnity land, may be conceded, but the fact that a railway company under a granting act may acquire an interest in indemnity land by a proper selection, by no means compels the conclusion that one seeking to exchange lands with the government under the Forest Reserve Act of 1897, acquires an interest by his

application to make such exchange. The distinction between the granting acts and the provision for the exchange of lands contained in the Act of 1897, is marked.

Speaking of the provisions authorizing the selection of indemnity lands by railway companies, the court, in *Weyerhaeuser* v. *Hoyt*, said:

> "It is beyond dispute on the face of the granting act of July 2nd, 1864, * * * that it was the purpose of Congress in making the grant, to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. (219 U. S., p. 387.)"

It further quoted with approval from an opinion given by Mr. Justice Vandeventer, when Assistant Attorney-General, as follows:

> "Under this legislation the Company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records. * * * In fact, a railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the Land Department as having the same segregative effect as a homestead or other entry made under the general land laws." (219 U. S., pp. 391-2.)

The decisions heretofore cited with respect to an application to exchange lands under the Act of 1897, show that such applications have no such effect. They are not entries of land, and until the application is accepted, do

not operate to segregate or appropriate the land as an entry does.

In the case of railroad indemnity selections, the base is a parcel of land within the primary limits of the grant, but which has been excluded therefrom for some cause, and for which the Act of Congress gives lieu lands within a restricted belt. The consideration, therefore, has passed from the Railway Company to the United States which has received the benefit of the exception from the grant. Under the Forest Reserve Act, the title to the base land remains in the owner, who parts with no consideration for the selected land until his deed of relinquishment is accepted by the government.

Under the railroad land grants there is a contract to convey lands to the grantee for a valuable consideration, namely, the construction of the railway. It is contemplated in these contracts that the railway company shall receive a certain number of sections of land per mile. There is no guarantee on the part of the government that this quantity of unoccupied lands, subject to the conditions of the grant, will be found within the primary or place limits, but the government agrees, in the event of deficiencies from certain causes, to permit the railway company to select lands in lieu of those excepted from the grant within a wider, but still restricted, territory. The theory of the grant of the right of selection within the indemnity belt is to afford the railway company an opportunity to obtain the quantity of lands which were within the primary limits and included in the sections numerically designated as granted. No such theory or equitable considerations affect the exchange of lands under the Forest Reserve Acts. The government, in creating the Forest Reserves, deprives the owners of lands within the boundaries of the Reservation of no legal

rights, and does no injury which could afford a basis for damages, even if the government were suable. The opportunity afforded by the act to exchange private lands within the limits of the Forest Reserve for public lands elsewhere, is a privilege conferred in a spirit of equity, but is one totally unaffected by legal or equitable considerations.

The distinction, therefore, between the right of selection given by the railroad land grant acts and the opportunity for exchange under the Forest Reserve Act, is marked, and the doctrine that a railroad indemnity selection based upon a consideration moving to the government, operating as an entry of the land selected, creates an interest in the railway company, affords no support for the doctrine that an application to exchange lands, where no consideration moves between the parties, which is a pure gratuity, does not operate as an entry of the land, and vests no equitable title or interest in the applicant, yet establishes a privity between the applicant and the government by virtue of which he can control the title, divesting it from the one to whom the government has subsequently conveyed.

Appellants in their bill (no brief has been served at this writing) charge that their alleged claims are recognized and confirmed by the provisions of the Act of Congress approved June 6th, 1900 (31 Stat. L. 614), Act approved March 3rd, 1901 (31 Stat. L. 1037), and Act approved March 3rd, 1905 (33 Stat. L. 1264). The provisions of the Acts of 1900 and 1901 are identical and are as follows:

> "That all selections of land made in lieu of a tract covered by an unperfected *bona fide* claim, or by a patent, included within a public forest reservation, as provided in the Act of June fourth, eighteen hundred and ninety-seven, entitled 'An Act making ap-

propriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes,' shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent: Provided, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof."

These provisions indicate the purpose of Congress to limit the right of selection which originally extended to "vacant land open to settlement" to "vacant surveyed non-mineral public lands which are subject to homestead entry." They excepted from this limitation applications which had been made prior to October 1, 1900. Such selections, however, acquired no additional force or strength by this exception. If, without the exception and independent of these acts, the applications vested no rights in the applicant, the passage of the acts did not create such or any rights. The utmost that could be said for these acts is that they implied a congressional construction that under the original acts unsurveyed lands were subject to selection.

The Act of March 3rd, 1905 (33 Stat. L. 1264), referred to in the bill, repeals in express terms, the Act of June 4th, 1897, the Act of June 6th, 1900, and of March 3rd, 1901, so far as such acts provided for the relinquishment, selection, and patenting of lands in lieu of tracts covered by an unperfected *bona fide* claim or patent within a forest reserve. To this repeal was added the following saving clause:

"But the validity of contracts entered into by the Secretary of the Interior prior to the passage of this act, shall not be impaired; *Provided,* that selections

heretofore made in lieu of lands reliquished to the United States may be perfected and patents issue therefor the same as though this act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof."

It needs no argument to show that unaccepted applications to exchange lands did not constitute contracts which the act provided should not be impaired. The effect of the last proviso was to permit selections made prior to the passage of the act to be perfected and patents to be issued therefor, but it imposed upon the department no greater duty to accept selections than had existed under the original act and in nowise changed the legal status of such selections or increased the rights of the applicants.

III.

THE APPELLANTS ARE NOT OFFERING TO DO EQUITY.

The doctrine that he who seeks equity must do equity, is never more strongly enforced than in actions where one asserting an equitable title applies to the Chancellor to compel a conveyance to him of the legal title held by another.

If A, by proper written contract, agrees to sell to B, and B agrees to purchase, a piece of land for a fixed consideration, and if A, in violation of this contract, conveys the land to C, who has knowledge of the existence of the contract to convey to B, B may apply to a court of equity to compel C to convey the land to him pursuant to the provisions of the contract with A, but, if he do this, he must tender to C the consideration which, according to the contract, he was to have paid to A. He cannot

withhold the consideration and yet compel the conveyance.

Yet this is precisely what the appellants seek to do in the present bill. Assuming that by their application for the exchange of lands they acquired a right to have patented to them the lands in controversy, yet that right was conditioned upon the conveyance by them to the government of the base lands situated within the Forest Reserve. We have seen that the government never having accepted tenders of such conveyance, the title to those lands still remains in appellants, but although they are asking the court of equity to compel the appellees to convey to them the selected lands, they have not, in the bill or elsewhere, tendered or offered to appellees a conveyance of the base lands, which was the consideration to be paid to the government.

IV.

THE CLAIMS OF APPELLANTS ARE BARRED BY THREE LACHES.

The bill of complaint shows (par. 6) that after making the second application, March 3rd, 1902, to wit, on November 2nd, 1902 (see p. 6) the Land Department of the United States, by order, suspended all further proceedings upon entries made with any of the so-called "Hyde Strip," and no definite act by appellants with reference to their application is alleged or shown after making the application, until the beginning of the present suit, which was instituted by filing the original bill and issuing a subpoena in the month of November, 1911. The bill charges (p. 11):

> "That your petitioners have at all times and in all things exercised due diligence in attempting to secure a hearing before the Land Department of the

United States, upon their said second application and entry upon said lands, made on March 3rd, 1902, as aforesaid. That no hearing has ever been had thereon, and no action has ever been taken thereon."

This allegation is, of course, a purely legal conclusion and valueless as showing any act or thing done to secure such action.

The bill further charges (par. VII) that on or about May 1st, 1908 (this year is a typographical error, as shown by the original bill and by the allegation in the same paragraph that the patent was recorded Sept. 29th, 1906, and the date in question should be May 1st, 1906) a patent was issued to Raymond Gray, one of the appellees, for the west half of the southeast quarter (W. ½ S. E. ¼) and the southeast quarter of the southwest quarter (S. E. ¼ S. W. ¼) of Section thirty-two (32), Township eleven (11) North, Range four (4) East, W. M., that this patent was filed for record and recorded in the office of the County Auditor of Lewis County, Washington, September 29th, 1906; that a patent for the west half of the northwest quarter (W. ½ N. W. ¼), the southeast quarter of the northwest quarter (S. E. ¼ N. W. ¼) and the northeast quarter of the southwest quarter (N. E. ¼ S. W. ¼) of Section thirty-two (32), same Township and Range, was issued to the appellee, Charles Forbes, November 8th, 1905, and was recorded in the office of the County Auditor of Lewis County, Washington, June 15th, 1907; that a patent for the northeast quarter of the northwest quarter (N. E. ¼ N. W. ¼) of Section thirty-two (32), same Township and Range, was issued by the United States to the appellee, John H. Patten, December 30th, 1907, and was recorded in the office of the County Auditor of Lewis County, February 5th, 1908.

It is further charged in the same paragraph of the bill

that after the issuance of these patents, and prior to the commencement of this suit, various transfers of the said lands were made by the patentees to one or more of the other appellees herein.

It is charged that the patents so issued and the conveyances so made were made without any knowledge thereof on the part of the appellants. But no excuse is offered for the acquiescence of appellants in the non-action of the land officers upon their application during the years which elapsed between the date of the application and the dates when the patents were issued under which the appellees hold, or for the failure of appellants to acquire knowledge of the existence of these patents, publicly recorded, between the dates of such recording and the beginning of the present action. During this unexplained delay by the appellants, portions of these lands changed hands, parties who are now joined as appellees acquiring interests under the then unchallenged patents.

It is charged, it is true, that such grantees and the patentees acted with knowledge of the applications which the appellants had made, but, we submit, that there is in all of this nothing to relieve appellants of the charge of laches in asserting their rights.

By the order of November 21st, 1902, suspending action upon the so-called "Hyde Scrip," the appellants were notified that the Department refused to act upon their applications. In this situation they had a plain and adequate remedy, by a proceeding in mandamus, to compel such action. They did not pursue this remedy, but saw fit to sit supine under this order.

After the lapse of more than eight years, and after parties had made entry of and secured patents for the lands in controversy, after other parties had purchased

from the patentees, who had a clear record title direct from the government, the appellants saw fit for the first time to attempt to assert an interest in these lands. We submit that this was too late. Knowing the situation of their application, and that the government was not recognizing the same, they were bound to exercise diligence in the assertion of their rights. They could not equitably sit quiet for years, paying no taxes, asserting no interest in these lands, and then be heard to complain or to ask the court to sacrifice appellees' interests for the protection of their claims which they had not previously seen fit to assert or maintain. Such unexplained acquiescence and neglect deprive appellants' claim of such equities as it might otherwise have.

Curtis v. *Lakin*, 94 Fed., 251, 255.
Felix v. *Patrick*, 145 U. S., 317, 332.
Galliher v. *Cadwell*, 145 U. S., 368.
Wood v. *Carpenter*, 101 U. S., 137, 139.

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